Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MANTALINE CORPORATION,
Petitioner,

v.

PPG INDUSTRIES, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does judicially mandated arbitration, based solely upon the terms of a purchase order delivered in a commercial transaction, that was not signed or agreed to by the vendor, and which was previously rejected by that vendor's proposed terms and conditions, violate the vendor's right to trial by jury, pursuant to Amendment VII to the Constitution of the United States of America, and Article I, § 5 of the Ohio Constitution?

2. Should Uniform Commercial Code § 2-207(3), which controls what terms and conditions become part of a contract between merchants when their writings do not, but their conduct does, recognize the existence of a contract, be interpreted to apply only when both merchants' writings may be construed as an offer?

PARTIES TO THE PROCEEDING

Petitioner

Mantaline Corporation, which has no parent or subsidiary companies.

Respondents

PPG Industries, Inc., which has no parent company or non-wholly owned subsidiary, and the American Arbitration Association.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not reported. A copy of the opinion is included in the Appendix[1] ("App.") at App. A, pages1a -16a. The Opinion of the United States District Court for the Northern District of Ohio, Eastern Division is not reported. A copy of the opinion is attached as App. B pages 17a-36a. The District Court entered final judgment on November 19, 1997, which is printed at 37a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on June 8, 2000. On June 16, 2000 Petitioners filed a Petition for Rehearing *En Banc*, which was denied on July 27, 2000, which denial is attached as App. C at 38a-39a. This Petition for Writ of Certiorari is filed within 90 days of the opinion and denial of the petition for rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

otherwise reexamined in any Court of the United States, than according to the rules of common law.

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Ohio Constitution, Article I, Section 5

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

****

Ohio Revised Code § 1302.10(C)[2]

Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such cases the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under the other provisions of . . . [the U.C.C.].

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Other Provisions of the Uniform Commercial Code

Other pertinent sections of the Uniform Commercial Code (in relevant part) are provided in App. D at 70a - 71a.

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[2] This statute is Ohio's version of §2-207(3) of the Uniform Commercial Code.

STATEMENT OF THE CASE

Petitioner Mantaline Corporation is a vendor of window gaskets. It received a request from Respondent PPG Industries, Inc. ("PPG") for a quotation for gaskets. Petitioner responded to PPG's request by providing a quotation on Petitioner's standard quotation form. That form states in part that any terms or conditions contained in Respondent's purchase order will not be binding upon Petitioner unless accepted in writing by Petitioner, upon terms which will indemnify Petitioner against all loss (App. G, 98a - 102a). In response to that quotation, PPG issued its purchase order to Petitioner, which contained preprinted terms and conditions that required dispute resolution by arbitration, required Petitioner to indemnify PPG for any loss related to Petitioner's product and insisted that only its terms and conditions would apply to any contract between PPG and its vendor (App. B, 20a -21a). No discussion or negotiation occurred about either Petitioner's or PPG's form terms and conditions and neither form was signed by the receiving party. Petitioner shipped and PPG paid for the gaskets.

Approximately eight years later, PPG's customer sued it, claiming that PPG's windows, which allegedly contained Petitioner's gaskets, were defective. PPG voluntarily settled that litigation after the expiration of about another three years. PPG then filed a demand for arbitration with Respondent American Arbitration Association, seeking to arbitrate PPG's indemnity claim against Petitioner.

Petitioner responded to PPG's arbitration demand by filing a declaratory judgment action in the Court of Common Pleas for Portage County, Ohio, requesting a determination of, among other things, whether Petitioner had agreed to arbitrate its dispute with PPG, and whether Petitioner's

quotation form prevented the application of PPG's arbitration clause and indemnity provision, which were only contained on its preprinted purchase order form. Petitioner also sought injunctive relief to prevent PPG's demanded arbitration from proceeding.

On March 3, 1995 PPG removed Petitioner's declaratory judgment action to the United States District Court for the Northern District of Ohio, which had jurisdiction over the case by virtue of 28 U.S.C. §1332. On May 31, 1995 the District Court held a hearing on Petitioner's motion for a preliminary injunction, and PPG's motions to dismiss and for summary judgment. On September 25, 1996 the District Court denied PPG's motions, and granted Mantaline's motion for injunctive relief, preventing resolution of PPG's claim by arbitration. On April 11, 1997 PPG counterclaimed against Petitioner for indemnification. On July 22, 1997 Petitioner filed, and on November 19, 1997 the District Court granted, Petitioner's motion for summary judgment, finding that PPG was not entitled to the benefit of the arbitration and indemnity provisions that were contained only in PPG's purchase order form for Petitioner's gaskets.

The District Court's judgment is based upon its application of Ohio's version of U.C.C. §2-207(3) (App. B at 34a), which specifically controls what provisions become part of a contract between merchants when the seller's and buyer's exchanged writings do not form, but their conduct does recognize, the existence of a contract. That statute provides and the District Court found that since Petitioner's quotation form and PPG's purchase order writings insisted upon the application of only their respective terms and conditions, that the parties' writings did not form a contract. The District Court further found that since Petitioner's delivery and PPG's payment for gaskets recognized a contract, such amount

consisted only of the agreed upon terms and conditions, along with those provided by the Uniform Commercial Code, which respectively did not include or excluded the application of PPG's arbitration and indemnity provisions.

PPG timely appealed to the United States Court of Appeals for the Sixth Circuit. On June 8, 2000, eighteen months after oral argument, a majority of the panel reversed the District Court's judgment, holding that PPG's purchase order arbitration clause and indemnity provision applied to its claim against Mantaline, and remanded the case for further proceedings. Petitioner's request for *en banc* review was denied on July 27, 2000.

ARGUMENT FOR GRANTING THE WRIT

Judicially mandated arbitration in this case, when there is no agreement or consent to arbitrate, is inconsistent with the cited constitutional provisions' mandate of the right to trial by jury and this Court's determination that only consensual arbitration provisions are enforceable. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), following *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). Here such arbitration is particularly egregious because the judicial mandate is based solely upon the terms of a purchase order delivered in a commercial transaction, that was neither signed nor agreed to by the vendor, but was previously rejected by that vendor's proposed terms and conditions of sale. The Sixth Circuit Court of Appeals, holding to the contrary in this case by a majority of the panel, ignored this mandate and precedent, finding that Petitioner had agreed to arbitrate by virtue of its delivery of product, notwithstanding its pre-performance written objection to any buyer-proposed contract

terms and conditions. This finding conflicts with this Court's holding in *Volt* that the Federal Arbitration Act's ("FAA") (9 U.S.C. § 2 *et seq.*) pro-arbitration policy does not operate without regard to the wishes of the contracting parties.

The Sixth Circuit Court of Appeals holding that mandates arbitration is also in conflict with *Axelson, Inc. v. McEvoy-Willis*, 7 F.3d 1230 (5th Cir. 1993). In *Axelson*, the Court rejected the buyer's proposal that its desired terms and conditions should become part of its contract with the seller because of the operation of Uniform Commercial Code § 2-207(3). *Axelson* considered and rejected the statutory interpretation of this code section that was adopted by this case. *Axelson* found that it is not necessary for the first writing in a commercial transaction to be an offer, before considering what terms and conditions become part of a contract, when the parties' writings do not, but their performance does, recognize the existence of that contract.

In the conclusion of Respondent/Appellant's Brief to the Sixth Circuit Court of Appeals, it states that the decision in this case will alter the commercial landscape, and that its effects cannot be overstated. If this Court allows inferior courts to mandate arbitration that is not consensual, Respondent's commentary about the result of this case may be accurate. To avoid that result, and because the holding of this case conflicts with cases decided by this Court and the Fifth Circuit Court of Appeals, granting this Petition for a Writ of Certiorari is appropriate.

ARGUMENT 1

Judicially mandated arbitration is improper, unless there has first been a meeting of the minds between the parties about the arbitration of their disputes.

The ruling of the Sixth Circuit Court of Appeals mandates arbitration of Respondent's claims against Petitioner. This ruling is improper because there was no meeting of the minds between Petitioner and Respondent about whether their disputes should be resolved by arbitration. In *Mastrobuono, supra,* this Court held "that the FAA's pro arbitration policy does not operate without regard to the wishes of the contracting parties." 514 U.S. at 57. Further, as this Court has stated, arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960). Petitioner's stated intention was to specifically exclude the terms and conditions of any contract that resulted from its quotations, including one relating to arbitration, unless that term was included in its quotation or it agreed to that term in writing. Manifestation of Petitioner's intention appears in the text of the quotation for gaskets that it sent to Respondent.

The Sixth Circuit Court of Appeals' decision in this case is supported only by a fiction that Petitioner agreed to Respondent's arbitration clause by shipping the product to Respondent. The Sixth Circuit decision found that Petitioner's pre-shipment written quotation to Respondent (App. A, at 3a-4a), which: (a) contains no arbitration provision, (b) states that any order shall be an express acceptance of Petitioner's written quotation terms of sale and

(c) rejects any additional terms unless accepted in writing by Petitioner, did not apply because Petitioner's communication did not satisfy the common-law definition of an offer. Application of that fictional agreement also conflicts with the Fifth Circuit Court of Appeals decision in *Axelson, supra*, that is discussed in the next section of this argument.

The Sixth Circuit Court of Appeals decision in this case conflicts with this Court's ruling in *Mastrobuono, supra,* that judicially mandated arbitration is improper, absent appropriate consent for dispute resolution by arbitration. Petitioner's communication with Respondent in this case specifically rejected Respondent's proposed terms, which might be contained in its purchase order, unless agreed to in writing by Petitioner. The facts as stipulated by Petitioner and Respondent (App. 13 at 21a - 22a) confirm that no evidence exists that Respondent's purchase order terms were discussed with or approved by Petitioner. Since Petitioner did not consent to arbitration, the decision mandating arbitration in this case was improper, and contrary to this Court's precedent.

ARGUMENT II

When merchants' exchanged writings do not create, but their conduct recognizes, the existence of a contract, that contract consists only of the agreed upon terms and conditions, and those terms added by the Uniform Commercial Code.

The Sixth Circuit Court of Appeals' mandate of arbitration, and determination that Respondent's purchase order indemnification provision is part of its contract with

Petitioner in this case, is based upon a judicial modification of § 2-207(3) of the Uniform Commercial Code. As such, this decision conflicts with the ruling of the Fifth Circuit Court of Appeals in *Axelson, supra.* Both this case and *Axelson* considered what terms and conditions become part of a contract between merchants for the purchase and sale of goods when their writings do not, but their conduct does, recognize the existence of a contract. These courts have written conflicting opinions, with the Sixth Circuit accepting and the Fifth Circuit rejecting the proposition that unless the first exchanged writing between merchants satisfies the definition of an "offer", § 2-207(3)[3] of the Uniform Commercial Code has no applicability. This section states:

> "Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such cases the terms of the particular contract consists of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

Petitioner's terms and conditions (App. G, at 98a) contained no arbitration clause or agreement to indemnify Respondent. The facts stipulated to by Petitioner and Respondent (App. B at 21a - 22a) confirm that no evidence exists that Respondent's purchase order terms were discussed with or approved by Petitioner. These facts and the instruction of this U.C.C. section conflict with the Sixth Circuit Court of

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[3] The cited statute is quoted from Ohio Revised Code section 1302.10(C), which is Ohio's version of U.C.C. § 2-207(3).

Appeal's mandate of arbitration, which has the effect of cramming down Respondent's purchase order indemnity obligation upon Petitioner.

No text contained within this cited U.C.C. section or Ohio case supports the Sixth Circuit Court of Appeal's judicial modification of this U.C.C. section, which determined its alleged inapplicability based solely on a nonexistent requirement that the first exchanged writing to be an "offer." The Sixth Circuit Court of Appeal's judicial modification of this U.C.C. section also directly conflicts with Official Comment 7 to it, which states:

> "In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made, in such cases, where the writings of the parties do not establish a contract, ***it is not necessary to determine which act or document constituted the offer and which the acceptance.*** *See* Section 2-204. The only question is what terms are included in the contract and subsection 3 [of U.C.C. § 2-207] furnishes the governing rule." (emphasis added).

In *Axelson, supra,* the Fifth Circuit Court of Appeals considered and rejected the analysis adopted by the Sixth Circuit Court of Appeals in this case, stating: "[e]ven if McEvoy is correct (about Axelson's quotation not being an offer, though) it cannot reach the result it wants. The quotation would not be an offer but the terms on which McEvoy was invited to make its offer were still clear enough." 7 F.3d at 1253.

Respondent's commentary in its brief to the Sixth Circuit Court of Appeals about the impact and importance of this decision may not be exaggerated. Interstate commerce is done on a daily basis with the exchange of form quotations and purchase orders, that contain conflicting terms and conditions for doing business, which are neither discussed nor considered by the contracting parties. A significant volume of litigation results from that practice. The Sixth Circuit Court of Appeals' judicial modification of U.C.C. § 2-207(3) is the sole support for its mandate of arbitration in this case, which modification is contrary to the analysis of this U.C.C. section by the Fifth Circuit Court of Appeals in *Axelson, supra*. Resolution of this conflict between the circuit court of appeals, and limitation of this unprecedented expansion of judicially mandated arbitration, can be started by granting this Petition for a Writ of Certiorari.

CONCLUSION

This Court has previously determined that judicially mandated arbitration is inappropriate, when the parties have not consented to resolve their disputes in this manner. Here, Petitioner objected to Respondent's addition of any terms and conditions to Petitioner's quotation terms and conditions, and did not sign Respondent's proposed purchase order form that contained the arbitration provision at issue in this case. Granting this Petition for a Writ of Certiorari is appropriate to prevent an expansion of judicially mandated arbitration, which is only supported by a fictional mutual consent based upon a delivery of products from Petitioner to Respondent. Application of that fiction is both inappropriate and illogical in view of Petitioner's objection to additional terms in its quotation.

Adoption of that fiction was also rejected by the Fifth Circuit Court of Appeals. Rejection of that fiction by this Court is appropriate and necessary to resolve this conflict of authority, and prevent judicially mandated arbitration that is not supported by the consent of the parties. Consideration of this case is also appropriate to address and finally resolve the real world problem of what terms and conditions become part of a contract in a commercial transaction, when the parties exchange proposed terms and conditions in quotation and purchase order forms, but never review or discuss the terms proposed by those forms, never sign those forms but engage in performance in accordance with Petitioner's quotation.

Petitioner prays that the Court will grant this Petition for a Writ of Certiorari to resolve these related questions, which have a significant and daily impact upon interstate commerce.

Respectfully Submitted,

/s/_____

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 8, 2000]

No. 97-4473

MANTALINE CORPORATION *Plaintiff-Appellee*,	)
v.	)
PPG INDUSTRIES, INC., *Defendant-Appellant*,	)
AMERICAN ARBITRATION ASSOCIATION, INC., *Defendant*.	)

On Appeal From The United States District Court For The Northern District of Ohio

Before: **NELSON**, **SILER**, and **DAUGHTREY**, Circuit Judges.

OPINION

DAVID A. NELSON, Circuit Judge. This is an appeal from a summary judgment in a commercial law case that turns on the question whether a contract of sale contained an arbitration provision. Concluding that the question is governed by Article 2-207(3) of the Uniform Commercial Code, as adopted in Ohio Rev. Code § 1302.10(C), the district court held that an arbitration clause set forth in the buyer's purchase order was not part of the contract. Upon *de novo* review, we conclude that UCC 2-207 is not controlling here and that under UCC 2-206 (Ohio Rev. Code § 1302.09) the offer contained in the purchase order, with all of its terms, was accepted without qualification when the goods were delivered. Accordingly, and because we find no waiver of the right to arbitrate, we shall reverse the challenged judgment.

I.

PPG Industries, which is based in Pittsburgh, Pennsylvania, purchased gaskets from Mantaline, an Ohio corporation, for use in installing windows at the Security Life building in Denver, Colorado. The gaskets allegedly leached sulphur, causing damage to the building. Security Life sued PPG in the United States District Court for the Southern District of Colorado. After attempting, unsuccessfully, to bring Mantaline into the suit as a third party defendant, PPG entered into a settlement agreement with Security Life.

PPG then commenced arbitration proceedings in Pittsburgh for resolution of its claims against Mantaline. Mantaline sought a declaratory judgment and injunction

against this arbitration in an Ohio state court, and PPG removed the action to the United States District Court for the Northern District of Ohio.

PPG then moved to dismiss Mantaline's action or stay the proceedings and compel arbitration. PPG also moved to transfer the action to the Western District of Pennsylvania. The district court denied PPG's motions and granted a preliminary injunction enjoining PPG from compelling arbitration. Having determined that the contract between the parties did not contain the arbitration and indemnification provisions relied on by PPG, the district court ultimately ruled in favor of Mantaline on cross-motions for summary judgment. This appeal followed.

II

Prior to purchasing the gaskets, PPG solicited price quotations from several companies, including Mantaline. Mantaline sent PPG a price quotation form in response to the solicitation. Because the actual document transmitted by Mantaline has been misplaced, we rely -- as did the district court -- on the content of Mantaline's standard price quotation form. This standard form contained a sentence reading as follows: "Any order placed in response to this quotation shall be deemed an express acceptance of each and every term and condition of sale contained herein and on the reverse side hereof." On the reverse side, the form said this:

> "This proposal is for immediate acceptance only and is subject to change at any time before orders are accepted by us. This proposal and our acceptance of your orders,

> signed by a representative of our Company, together with your order, constitutes the entire contract between us. Modifications, changes, additions, cancellations or suspensions will not be binding upon us unless accepted by a representative of our Company in writing upon terms which will indemnify us against all loss. The terms and conditions contained in this quotation shall prevail over any inconsistent terms contained in buyer's purchase order."

Following receipt of the quotation, PPG sent a purchase order to Mantaline. The purchase order contained the following declaration:

> "THIS PURCHASE ORDER IS EFFECTIVE AND EXPRESSLY CONDITIONAL ON SUPPLIER'S ASSENT TO ALL TERMS AND CONDITIONS IN THIS PURCHASE ORDER THAT ARE ADDITIONAL TO OR DIFFERENT FROM THOSE STATED IN SUPPLIER'S QUOTATION OR OTHER OFFERING DOCUMENTS. SUPPLIER'S ASSENT TO THIS PROVISION WILL BE MANIFESTED BY DELIVERY OF ANY PORTION OF THE GOODS DESIGNATED HEREIN."

The reverse side of the purchase order included provisions stating that the "[s]eller agrees to indemnify" PPG and agrees to binding arbitration for the resolution of any disputes "arising out of or relating to this Purchase Order, or breach thereof."

After receiving PPG's purchase order, and without objecting to any of the provisions contained therein, Mantaline shipped the gaskets.

The district court correctly determined that Mantaline's price quotation form did not constitute a "formal 'offer' under traditional contract analysis." "An 'offer'," as the district court explained, "has been defined in Ohio case law as the 'manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" See *Leaseway Distribution Ctrs., Inc. v. Ohio Dep't of Admin. Servs.*, 550 N.E.2d 955, 961 (Ohio. Ct. App. 1988) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981)) The Mantaline form specifically reserved to Mantaline final acceptance of any purchase order and conditioned the formation of any contract on the signature of a Mantaline representative accepting the purchase order.

Notwithstanding that PPG's purchase order, unlike Mantaline's price quotation form, did constitute an "offer" under traditional contract analysis, and notwithstanding that Mantaline shipped the gaskets without adding or disclaiming any contract terms once the purchase order had been received, the district court concluded that the arbitration and indemnification terms proposed by PPG were excluded from the contract under Ohio's version of Article 2-207 of the Uniform Commercial Code, Ohio Revised Code § 1302.10, captioned "Additional terms in acceptance or confirmation." Ohio Rev. Code § 1302.10(C) reads as follows:

> "Conduct by both parties that recognizes the existence of a contract is sufficient to establish

> a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [this Act]."

Section 1302.10(C) does not exist in isolation. In the first place, we cannot ignore Ohio Rev. Code § 1302.09, captioned "Offer and acceptance in formation of contract." Subsection A of § 1302.09 provides in relevant part as follows:

> "Unless otherwise unambiguously indicated by the language or circumstances:
>
> (1) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
>
> (2) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods. . . ."

Consistent with the express terms of PPG's purchase order, subsection (A)(2) thus says that a purchase order shall be construed as inviting acceptance by the prompt shipment of conforming goods. An exception to this principle is

recognized where the order itself or the circumstances "unambiguously" indicate otherwise, but we are not persuaded that the exception applies here. The language of the order certainly does not indicate that it should be construed as anything other than an offer inviting acceptance by the prompt shipment of conforming goods, and it does not seem to us that the provision on the reverse of Mantaline's earlier price quotation form-- a provision which the district court assumed neither party had actually read -- rises to the dignity of a "circumstance" that "unambiguously" negates § 1302.09(A)(2). The price quotation form was simply an invitation to deal, after all, and not an offer capable of ripening into a contract upon acceptance by PPG. That being so, and Mantaline having shipped the goods -- without any contemporaneous disclaimer -- in response to PPG's purchase order, § 1302.09(A)(2) would seem to be directly applicable. If so, PPG's purchase order ripened into a contract when Mantaline accepted it by the prompt shipment of conforming goods.

In the second place, § 1302.10(C) should be read in conjunction with the preceding subsections of § 1302.10:

> "(A) A definite and seasonable expression of acceptance or a written, confirmation that is sent within a reasonable time operates as an acceptance even though it states terms additional or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

> (B) The additional terms are to be construed as proposals for addition to the contract. Between merchants, the terms become part of the contract unless one of the following applies:
>
> (1) The offer expressly limits acceptance to the terms of the offer.
>
> (2) They materially alter it.
>
> (3) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received." Ohio Rev. Code § 1302.10(A) and (B).

Subsection (A) says, in brief, that under certain conditions an expression of acceptance can cause an offer to ripen into a contract "even though [the expression of acceptance] states terms additional or different from those offered. . . ." This leaves unanswered the question of what the terms of the contract are. Subsection (B) provides an answer for some cases, but not for the situation -- like ours -- where "[t]he offer expressly limits acceptance to the terms of the offer." (Such a limitation is set forth in the "acceptance" term of the PPG purchase order.) A further answer is provided by subsection (C). However, as we read it, subsection (C) is relevant only where subsection (A) applies -- that is, where the "expression of acceptance . . . states terms additional or different from those offered. . . ." Subsection (A) has no application to the case now before us, because Mantaline gave no "expression of acceptance" stating terms

different from those offered by PPG. Ohio Rev. Code § 1302.10, in our view, is thus inapplicable here. There were, to quote the caption of § 1302.10, no "[a]dditional terms in [the] acceptance or confirmation."

We are strengthened in this conclusion by *Litton Microwave Cooking Prods. v. Leviton Mfg. Co., Inc.*, 15 F.3d 790 (8th Cir. 1994). In *Litton*, the Eighth Circuit held that the Minnesota counterpart of the Ohio Rev. Code § 1302.10 tells the courts how to resolve a "battle of the forms" only in a situation where a boilerplate offer is accepted by a form that contains additional or different terms:

> "For a 'battle of the forms' to arise and trigger the provisions of § 2-207, there must be conflicting forms to begin with, *each of which satisfies the commonlaw or statutory requirements for an offer.* If the first form is not an offer, there can be no battle." *Id.* at 794 (emphasis supplied).

In the case now before us, as the district court correctly found, Mantaline's price quotation form did not satisfy the requirements for an offer. Thus, following *Litton,* there was no "battle" here that could trigger the provisions of section 1302.10.

McJunkin Corp. v. Mechanicals, Inc., 888 F.2d 481 (6th Cir. 1989), is not to the contrary. The seller in *McJunkin* sent a post-shipment but seasonable order acknowledgment containing terms that differed from those in the purchase order, and the buyer accepted the goods without

objection. The *McJunkin* facts thus fit the paradigm set out in § 1302.10(A). As the McJunkin court noted, the seller's

> "acknowledgment was thus a 'definite and [r]easonable expression of acceptance or a written confirmation . . . sent within a reasonable time' which could have operated as an acceptance under § 1302.10(A), with the terms of any resulting contract being determined in accordance with Ohio Rev. Code § 1302.10." *McJunkin,* 888 F.2d at 487.

Because Mantaline made no "expression of acceptance" stating terms different from those offered by PPG, the present case is not controlled by *McJunkin*.[1]

In sum, the forward-looking language in Mantaline's invitation to deal (the price quotation form) fell by the

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[1] *Axelson, Inc. v. McEvoy-Willis*, 7 F.3d 1230 (5th Cir. 1993), does not alter our conclusion either. In that case the court accepted the proposition that, under one possible analysis of the facts, an informal purchase order sent by telex had conformed to the terms of the seller's price quotation, thus incorporating those terms in the contract that resulted from the seller's subsequent acceptance of the informal order. A formal purchase order sent many weeks later was held to be ineffective to alter the terms of the contract that had already been entered into. In the case at bar, by contrast, there was only one purchase order, it expressly rejected the terms of the price quotation, and no contract arose until the goods were shipped pursuant to the purchase order.

wayside when the contract was formed. Because PPG's purchase order constituted the sole "offer," and Mantaline's shipment of conforming goods constituted an unqualified "acceptance" of the offer, the resulting contract included the terms of PPG's purchase order providing for indemnification and arbitration of disputes.

III

We turn next to the question whether PPG waived its right to arbitration when it sought to bring Mantaline into the Colorado Security Life action. A party may waive its right to arbitrate "when the party actively participates in litigation or acts inconsistently with its rights to proceed with arbitration." *Siam Feather & Forest Prods. Co. v. Midwest Feather Co.*, 503 F.Supp. 239, 242 (S.D. Ohio 1980), *aff'd*, 663 F.2d 1073 (1981) (Table). Waiver, in other words, may result from actions which are "completely inconsistent with any reliance thereon." *H& M Charters, Inc. v. Reed,* 757 F.Supp. 859, 865 (S.D. Ohio 1991). The court "must examine both the nature and the extent of the participation in the suit" to determine whether the right to arbitration has been waived. *Siam Feather,* 503 F.Supp. at 242. Prejudice to the opposing party is a significant factor in this determination. See *id.; H & M Charters,* 757 F.Supp. at 865.

Mantaline cites *Central Trust Co., N.A. v. Anemostat Prods. Div.*, 621 F.Supp. 44, 46 (S.D. Ohio 1985), for the proposition that filing a responsive pleading constitutes waiver. *Central Trust,* however, suggests that it is "substantial participation in litigation" that is productive of the prejudice to an opposing party that warrants waiver. See *id.*

What PPG did in the Colorado Security Life proceeding was to issue a non-party subpoena for Mantaline's records and request permission to file a third-party complaint against Mantaline. The request was denied. PPG acknowledges that if the request had been granted, PPG "would have affirmatively waived the arbitration clause and proceeded against [Mantaline] in that action." Because Mantaline was not brought into and did not participate in the Security Life action, however, we do not see any prejudice to Mantaline.

Mantaline points to PPG's filing of a counterclaim and participation in discovery in Mantaline's action for declaratory judgment and injunctive relief, and to the time that has passed since Mantaline commenced its action. We do not believe that a party's attempt to defend its right to arbitrate can be used to show waiver. See *Siam Feather,* 503 F.Supp. at 242; H & M Charters, 757 F.Supp. at 865 ("' [W]aiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of the contract, but attempts to meet all issues raised in litigation between it and another party to the agreement.'") (quoting *Germany v. River Terminal Ry. Co.*, 477 F.2d 546, 547 (6th Cir. 1973)). PPG has not waived its right to arbitrate. (The district court, we note, indicated that it would have reached the same conclusion had it found that the contract provided for arbitration.)

IV

By statute, "[f]or the convenience of parties and witnesses, in the interests of justice," a district court may transfer a civil action "to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). PPG

contends that the district court should have transferred this case at the outset because only the Western District of Pennsylvania could compel Mantaline to arbitrate in the then-pending proceeding.

We agree with the district court's conclusion that before it or any court could order arbitration, there had to be a determination of whether the parties had agreed to arbitrate. PPG has not shown that a transfer for the resolution of this preliminary question would better serve the convenience of parties and witnesses or otherwise be in the interests of justice. Thus, the district court did not abuse its discretion in declining to transfer the motion at this stage of the proceedings. See *Phelps v. McClellan,* 30 F.3d 658, 663 (6th Cir. 1994). PPG is not foreclosed from renewing its motion for transfer, of course, now that the threshold question has been resolved.

The judgment as to whether the contract between Mantaline and PPG provided for arbitration is **REVERSED**. The order as to transfer is **AFFIRMED**, and the case is remanded for further proceedings not inconsistent with this opinion.

Siler, Circuit Judge, dissenting. I would affirm the district court's decision. The district court correctly found that Mantaline's quotation form could not be construed as a formal offer under traditional contract analysis, because Mantaline's form reserved to it the final acceptance of any purchase order, and no contract could be formed unless one of Mantaline's representatives signed the order. As the court noted, under Ohio law, an offer must be the "manifestation of willingness to enter into a bargain, so made as to justify

another person in understanding that his assent to that bargain is invited and will conclude it." *Leaseway Distrib. Ctrs., Inc. v. Ohio Dep't of Adm. Servs.*, 550 N.E.2d 955, 961 (Oh. Ct. App. 1988) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981)).

The district court also correctly held that even if PPG's purchase order technically represented an "offer" to Mantaline, Mantaline did not accept PPG's offer on PPG's terms. I agree with the district court that OHIO REV. CODE ANN. § 1302.10(C) governs:

> Conduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [this Act].

Here the actions of the parties, in shipping, receiving and paying for the gaskets, acknowledge the existence of the contract. The competing forms of the parties, on the other hand, indicate that the parties disagreed about mandatory arbitration and indemnification. Mandatory arbitration and indemnification thus were not terms of the contract.

McJunkin Corp. v. Mechanicals, Inc., 888 F.2d 481, 482 (6th Cir. 1989), supports the decision by the district court. While the factual circumstances of *McJunkin* were somewhat

distinguishable, the opinion indicates that § 1302.10(C) is to be broadly applied:

> The problem underlying any "battle of the forms" is that parties engaged in commerce have failed to incorporate into one formal, signed contract the explicit terms of their contractual relationship. Instead, each has been content to rely upon standard terms which each has included in its purchase orders or acknowledgements, terms which often conflict with those in the other parties' documents. . . . This case presents a situation typical in any battle of the forms: it is not that the parties' forms have said too little, but rather that they have said too much yet have expressly agreed upon too little.

McJunkin, 888 F.2d at 482.

McJunkin ultimately found intent determinative, holding "that the more reasonable interpretation of the parties' actions is that Alaskan [the seller], through its shipment and transmission of an acknowledgement within a few short days, did not intend to bind itself to *McJunkin's* [the buyer's] terms, but instead to sought to incorporate its own terms into a contract with *McJunkin." Id.* at 487. The *McJunkin* court also rejected the notion that *McJunkin* accepted the terms of Alaskan's acknowledgement by failing to object. *Id.* at 488.

Here, even if Mantaline accepted PPG's "offer" by shipping the gaskets, its price quotation form indicated in advance its objection to any inconsistent terms in PPG's

purchase order. Nothing indicates that Mantaline intended to agree to mandatory arbitration and indemnification. Therefore, PPG did not acquire a contractual right to arbitration and indemnification.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

[Filed November 19, 1997]

No. 5:95 CV 612

MANTALINE CORPORATION,
Plaintiff,

v.

PPG INDUSTRIES, INC.,
Defendant.

ORDER

Now before the court are the parties' cross-motions for summary judgment. The dispute in this case surrounds the terms of the contract between Plaintiff Mantaline Corporation ("Mantaline") and Defendant PPG Industries ("PPG"). Mantaline moves for summary judgment based on its assertion that the contract does not contain a mandatory arbitration provision, or in the alternative, that PPG waived any right it had to compel Mantaline to submit to arbitration when it pursued discovery and attempted to join Mantaline as a third party defendant in a related civil action in Colorado. PPG moves for summary judgment based on the opposing claim

that the contract *did* oblige Mantaline to submit to arbitration, PPG preserved its right to enforce this obligation, and PPG is now entitled to indemnification from Mantaline for damages it allegedly incurred. The court has considered the parties' arguments, and is now prepared to offer a decision in this matter.

Background

In January of 1986, PPG was preparing a bid to supply windows for the Security Life Center in Denver, Colorado. (Stipulated Facts, Plaintiffs Exhibit A, ¶ 1.) As part of its preparation, PPG sought quotations from several companies regarding the cost of interior and exterior glazing gaskets. Mantaline was among these companies. (Id.)

Ms. Joanne Reynolds, Mantaline's sales administrator, received PPG's request for a written quotation, and responded by sending Mantaline's response on Mantaline's standard quotation form. (Id. at ¶ 2.) The actual quotation form sent by Ms. Reynolds and received by PPG has been lost. (Id.) Mantaline's standard quotation form, however, contains the following language:

> Any order placed in response to this quotation shall be deemed an express acceptance of each and every term and condition of sale contained herein. . . .
>
> This proposal is for immediate acceptance only and is subject to change at any time before orders are accepted by us. This proposal and our acceptance of your orders, signed by a

> representative of our Company, constitutes the entire contract between us. Modifications, changes, additions, cancellations or suspensions will not be binding upon us unless accepted by a representative of our Company in writing upon terms which will indemnify us against all loss. The terms and conditions contained in this quotation shall prevail over any inconsistent terms contained in buyer's purchase order.

(Plaintiff's Exhibit B.) The court has no reason to believe, nor does Defendant attempt to argue, that the actual quotation form received by PPG did not contain the above-quoted language.

On January 7, 1986, in response to Mantaline's quotation form, PPG issued a purchase order to Mantaline, asking Mantaline to provide "all interior and exterior glazing gaskets" for the Security Life Center project. (Defendant's Exhibit A.) The actual purchase order sent to Mantaline contains the following language:

> This purchase order is effective and expressly conditional on supplier's assent to all terms and conditions in this purchase order that are additional to or different from those stated in supplier's quotation or other offering documents. Supplier's assent to this provision will be manifested by delivery of any portion of the goods designated herein. . . .

This Purchase Order contains the entire contract between the parties hereto with respect to the materials specified or the work to be performed hereunder, and no contract or other understanding in any way purporting to modify, or supersede the terms hereof shall be binding upon Buyer unless otherwise expressly agreed to by Buyer in writing. Seller's acceptance of this Purchase Order (whether by execution of the Acceptance Copy or otherwise), commencement of performance hereunder or shipment of materials ordered hereby shall conclusively evidence Seller's acceptance of this Purchase Order and the terms hereof. Buyer hereby expressly objects to any provision, terms or conditions of any of Seller's printed forms or other writings which is additional to, different from, or inconsistent with those contained or referred to herein. Buyer's acceptance of or payment for any shipment required under this Purchase Order shall not in any way alter the terms hereof.

(Id.) The purchase order contained a mandatory indemnification provision[1] and a mandatory arbitration provision.[2]

There is no evidence that the parties ever discussed the inconsistency of the terms terms contained in the quotation form and the purchase order. Similarly, there is no evidence that the parties ever "bargained" for or "dickered" over any

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[1] The mandatory indemnification provision states, "[s]eller agrees to indemnify, defend and hold har Buyer, its officers, employees and representatives, from and against any and all damages, claims, demands, expenses (including reasonable attorneys' fees), losses or liabilities of any nature whatsoever, and whether involving injury or damage to person or property, and any and all suits, causes of action and proceedings thereon arising or allegedly arising from or attributable to: (i) the materials, services or work herein ordered, furnished or from the use thereof; (ii) Seller's failure to comply with any applicable law, rule or regulation; or (iii) from any breach or default by Seller hereunder; excepting when caused by the proximate negligence of Buyer."

[2] The mandatory arbitration provision states, "[a]ny claim or controversy arising out of or relating to this Purchase order, or breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the reward rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof. Any such arbitration shall take place in Pittsburgh, Pennsylvania, or other such place as Buyer may reasonable designate. The party against which the award is rendered shall assume and pay all costs associated with such arbitration, including but not limited to reasonable attorney's fees incurred by the other party."

of the terms of the agreement aside from the price and amount of gaskets described in the quotation form and purchase order. Following its receipt of PPG's purchase order, Mantaline shipped the goods to PPG. (Stipulated Facts, at ¶ 2.) PPG used the goods in carrying out its contract to supply windows to the Security Life Center. (Id.) No formal contract was ever signed.

On October 22, 1992, Security Life Insurance Company ("Security Life") brought suit against PPG in the United States District Court for the Southern District of Colorado, in connection with its construction of the Security Life Center. (PPG's Responses to Requests for Admissions, Plaintiff's Exhibit E.) PPG issued a document deposition subpoena to Mantaline during this litigation. (Id.) On June 9, 1993, PPG moved for leave to file a third party complaint against Mantaline, based on its assertion that Mantaline, and not PPG, was responsible for whatever damages had been incurred by Security Life. (Id.) The court denied this motion.

PPG ultimately settled its dispute with Security Life. On February 9, 1995, PPG filed an arbitration demand with the American Arbitration Association with respect to its claims against Mantaline. (Id.) Mantaline responded by filing a declaratory judgment action in the the Court of Common Pleas of Portage County, Ohio, requesting a determination of (1) whether Mantaline agreed to arbitrate its disputes with PPG, (2) whether PPG waived its right to arbitration when it involved Mantaline in a cross-claim and pursued discovery in the Colorado litigation, (3) whether Mantaline must indemnify PPG for its liability or costs in the Colorado litigation; and (4) whether Mantaline's quotation

prevented the terms in PPG's purchase order from becoming effective. Plaintiff also requested a temporary restraining order enjoining the pending arbitration, which the court granted.

On March 3, 1995, Defendant PPG removed the declaratory judgment action to this court. (Docket # 1.) PPG asked the court to vacate the TRO entered by the Court of Common Pleas. (Docket #2.) Mantaline moved for remand. (Docket #3.) The court denied the motion to remand, and denied the motion to vacate the TRO as moot because the TRO had expired of its own accord. (Docket #s 12, 41.)

Defendant PPG filed two other motions: a motion to dismiss, or in the alternative to stay the proceedings in favor of arbitration to compel such arbitration (Docket #15), and a motion to transfer the action to the Western District of Pennsylvania (Docket # 16). On May 31, 1995, this court held a hearing and took evidence on Plaintiff's motion for a preliminary injunction. Having heard evidence in that proceeding that was relevant to Defendant's motion to dismiss, the court informed the parties that it would treat the motion to dismiss as one for summary judgment pursuant to F.R.C.P. 12(b), and allowed fifteen days to supplement the record with additional evidentiary materials. (Docket #29.)

On September 25, 1996, the court issued an order denying both Defendant PPG's motion to transfer the action and its motion for summary judgment. (Docket # 41.) In doing so, the court applied O.R.C. § 1302.10(C), which states:

> Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such cases the terms of the particular contract consists of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

The court found that Mantaline's quotation form and PPG's purchase order were insufficient, by themselves, to establish a contract between the parties. It was obvious, however, that the parties were bound by some type of contractual arrangement -- Mantaline had delivered, and PPG had paid for, the gaskets described in the purchase order. The question before the court, then, involved the terms, and not the existence, of the contract. Applying § 1302.10(C), the court noted that the writings of the parties were inconsistent with respect to the inclusion of mandatory arbitration and indemnification provisions. Because it appeared that the inconsistent writings did not themselves establish a contract for sale, the court ruled that the disputed terms could not be considered part of an ultimately enforceable agreement.

The court also granted Plaintiff Mantaline's request for a preliminary injunction, enjoining Defendant PPG from compelling arbitration of their dispute. The court found that Plaintiff had demonstrated a substantial likelihood of success with respect to its claim that the contract between the parties did not contain enforceable arbitration and indemnification provisions. The court also found that the other elements necessary to justify the equitable remedy of a preliminary

injunction were in place: irreparable harm to Mantaline in the absence of the injunction, lack of substantial harm to others if the injunction were to issue, and an absence of harm to the public interest. The court found that Plaintiff had not demonstrated a substantial likelihood of success, however, with respect to its alternative claim that, if the contract did contain a mandatory arbitration provision, PPG waived its right to compel such arbitration by pursuing discovery against Mantaline and attempting to join Mantaline in the Colorado litigation.

On April 11, 1997 PPG counterclaimed against Mantaline, seeking indemnification for the damage that it allegedly incurred due to Mantaline's "faulty gaskets." (Docket # 58.) On July 22, 1997, Mantaline moved for summary judgment on Counts I through IV of its amended complaint, based on its assertion that the court properly applied O.R.C. § 1302.10(C) in concluding that the contract between the parties contained no mandatory arbitration or indemnification provisions, or in the alternative, that PPG waived any right it had to compel arbitration by attempting to involve Mantaline in the Colorado litigation. (Docket # 69.) On August 11, 1997, PPG submitted a cross-motion for summary judgment on its counterclaim. (Docket # 71.) In essence, the parties' cross-motions invite the court to revisit its earlier conclusions in this case, particularly regarding the application of O.R.C. § 1302.10 to the 1986 agreement between the parties. The court accepts the parties' invitation in this regard, and has reconsidered the case in light of their present arguments.

Standard of Review

The Court of Appeals for the Sixth Circuit recently summarized the standard of review governing motions for summary judgment under Federal Rule of Civil Procedure 56:

> Summary judgment is appropriate where 'there is no genuine issue of material fact . . . and the moving party is entitled to judgment as a matter of law.' . . . [The] court must view all facts and inferences drawn therefrom in the light most favorable to the non-moving party.
>
> The moving party has the burden of conclusively showing that no genuine issue of material fact exists. Nevertheless, in the face of a summary judgment motion, the nonmoving party cannot rest on its pleadings but must come forward with some probative evidence to support its claim.
>
> 'By its very terms, this standard provides that the existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." The dispute must be genuine and the facts must be such that if they were proven at trial, a reasonable jury could return a verdict in favor of the nonmoving party. If the disputed evidence 'is merely colorable or is not significantly probative, summary judgment may be granted.'

Leo LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 378 (6th Cir. 1993) (citations omitted). With this standard in mind, the court shall analyze the parties' cross-motions for summary judgment.

Law and Analysis

There are, essentially, two issues before the court. The first issue concerns the terms of the contract between Mantaline and PPG, particularly whether such contract includes the mandatory arbitration and indemnification clauses contained in PPG's purchase order. The second issue concerns whether PPG waived any right it might have had to compel Mantaline to submit to arbitration.

I.

The Terms of the Contract

A.

The Battle of the Forms

With respect, to the first issue, the court is asked to determine whether the facts before it give rise to a "battle of the forms" situation. Professors White and Summers describe the "battle of the forms" in the following way:

> Often here is what happens: underlings of seller and buyer each sit in their respective offices with a telephone and a stack of form contracts. Seller's lawyer has drafted seller's forms to give him advantage. Buyer's lawyer

> has drafted buyer's forms to give him advantage. The two sets of forms naturally diverge. They may diverge not only in substantive terms but also in permissible methods of contract formation.
>
> The process of 'contracting' begins with underling telephoning underling or with the dispatch of a form. When the process ends, there will usually be two forms involved, seller's and buyer's, and each form may even be signed by both underlings. The deal will coincide with respect to the few bargained terms such as price, quality and quantity terms, and delivery terms. But on other terms, the respective forms will diverge in important respects. Frequently this will pose no problem, for the deal will go forward without breakdown. But sometimes the parties will fall into dispute even before the occasion for performance. More often, one or both will perform or start to perform and a dispute will break out. In all such cases the parties will then haul out their forms and read them -- perhaps for the first time and they will find that their forms diverge. Is there a contract? If so, what are its terms?

JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-2 (1972). Under the common law, a "battle of the forms" situation favored the last party to submit a form, because the "mirror image rule" dictated that any counter-offer proposing a substitute bargain operated as

a rejection of the original offer. RESTATEMENT (SECOND) OF CONTRACTS § 39 (1979). The new offeror, then, dictated the terms of the bargain with his or her form. Section 2-207 of the U.C.C., upon which O.R.C. 1302.10 is based, was designed to solve this problem by establishing the rule that neither party's form would prevail in a "battle of the forms" situation. Only the terms upon which the forms agreed would be enforceable.

B.

The Arguments of the Parties

The parties dispute the applicability of a "battle of the forms" analysis. PPG argues that this was not a case with two conflicting offers. PPG points out that Mantaline's quotation form contained a reservation of Mantaline's authority to accept or deny incoming orders. Therefore, says PPG, the quotation form cannot be construed as an offer, but must be seen as an invitation to PPG to negotiate the terms of the agreement. PPG responded to this invitation by making a formal offer via its purchase order. The offer expressly stated that Mantaline would accept PPG's terms by performing. Mantaline *did* so accept by sending the gaskets to PPG, and in any case Mantaline never complained about PPG's terms. Mantaline cannot now claim that its irrelevant quotation form somehow trumps the terms of an accepted offer.

Mantaline, on the other hand, makes two arguments. First, it argues that its quotation form *was* an offer to PPG. PPG's purchase order was either an acceptance of this offer or a counter-offer, and any additional terms contained therein

are therefore excluded from the enforceable contract by § 1302.10. Second, Mantaline argues that even if its quotation form was not, technically speaking, an offer, Mantaline never actually accepted PPG's terms as expressed in its purchase order. At most, Mantaline was silent as to its acceptance or rejection of PPG's terms, particularly because it did not consider PPG's purchase order to be a binding contractual offer containing the terms of the deal. Silence, Mantaline argues, is not sufficient to operate as an acceptance of PPG's "offer." Mantaline asks the court to find, therefore, that a "battle of the forms" situation has occurred whether or not its quotation form is a technical offer. The writings in evidence are not sufficient by themselves to create a contract between the parties. This contract was created by conduct, not writings, and the forms exchanged were incidental to the actual deal consummated. Applying § 1302.10, then, the court must conclude that the contract does not include arbitration and indemnification clauses.

C.

Mantaline's Quotation Form

As an initial matter, the court finds that Mantaline's quotation form cannot be construed as an formal "offer" under traditional contract analysis. An "offer" has been defined in Ohio case law as the "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that this assent to that bargain is invited and will conclude it." Leasewav Distrib. Centers, Inc. v. Ohio Dept. of Adm. Serv., 49 Ohio App. 3d 99, 105, 550 N.E. 2d 955, 961 (Oh. Ct. App. 1981). Here, Mantaline's form stated that "[t]his proposal is for immediate acceptance only and is

subject to change at any time before orders are accepted by us. This proposal and our acceptance of your orders, signed by a representative of our Company, constitutes the entire contract between us." PPG could not have understood the quotation form to signal Mantaline's assent to an instant bargain the moment that PPG responded to the form. Instead, it appears that Mantaline officials had the authority to reject incoming responses to a quotation form, and that PPG was positioned to submit an offer of its own before a contract could be created. See Technographics Inc. v. Mercer Corporation, 777 F.Supp. 1214, 1216 (M.D.Pa. 1991) (holding that home office acceptance clause in quotation form precluded form from being an offer, creating instead an invitation to negotiate).

Following this mechanical contract analysis, PPG's purchase order was, in fact, an "offer" to Mantaline. It remains to be seen, however, whether Mantaline *accepted* PPG's offer according to the terms contained in the purchase order.

D.

The Creation of the Contract

O.R.C. § 1302.10(A) states:

> A definite and seasonable expression of acceptance or a written confirmation that is sent within a reasonable time operates as an acceptance even though it states terms additional or different from those offered or agreed upon, unless acceptance is expressly

> made conditional on assent to the additional or different terms.

PPG argues that Mantaline accepted its offer by performing. Because Mantaline accepted by performance and did not expressly make that performance conditional on assent to any terms additional to or different from those contained in the purchase order, Mantaline must now be bound by the terms in PPG's offer. Mantaline argues that it did not *intend* to accept PPG's terms in its purchase, order because Mantaline assumed that its quotation form was the relevant offer between the parties. This explains why Mantaline never verbally rejected PPG's terms.

In determining whether Mantaline actually accepted PPG's offer in its purchase order, the court is guided by the decision of the Sixth Circuit in McJunkin Corporation v. Mechanicals, Inc., 888 F.2d 481 (6th Cir. 1989). In McJunkin, a buyer of goods submitted a purchase order to a seller of goods, which contained a number of terms favoring the buyer. Id. at 487. The seller then performed by sending the goods to the buyer, but sent along an acknowledgment form which expressly conditioned acceptance on purchaser's assent to certain terms favoring the seller. Id. Seller attempted to argue that the buyer, through its silence, had accepted the terms in the acknowledgment form. The Court of Appeals held that:

> Although [seller]'s contract terms might indicate that [buyer]'s failure to object within a reasonable time constituted [buyer]'s acceptance of [seller]'s terms, we find that [buyer] did not accept [seller]'s terms.

> [Buyer] never explicitly accepted the terms of [seller]'s acknowledgment. Given [buyer]'s *silence in the face of [seller]'s* acknowledgment, [buyer] was not bound by those terms.

Id. citing Dorton v. Collins & Aikman, 453 F.2d 1161 at 1168 n.4 (6th Cir. 1972) (interpreting Tennessee U.C.C. § 2-207 and rejecting contention that inaction or silence constitutes acceptance of terms in competing document).

The Court went on to consider whether the seller accepted the terms of buyer's purchase order by performance. It held that seller had not accepted buyer's terms, because its acknowledgment form was expressly conditioned on buyer's assent to seller's terms. Id. The court found, therefore, that the writings failed to create a contract between the parties, and that any contract in existence was created by the parties' conduct. Id.

In the case at hand, PPG argues that Mantaline accepted the terms in the purchase order by performing and by failing to explicitly reject such terms. The court finds that Mantaline's silence in this regard does not constitute acceptance of PPG's terms. Similarly, the court finds that Mantaline's performance did not constitute acceptance of PPG's offer as a general matter, because Mantaline's quotation form, though not itself an offer, expressly conditioned its acceptance of any offers to the other party's acceptance of the terms in the quotation form. It is true that Mantaline's quotation form was sent to PPG *before* Mantaline received PPG's purchase order and *before* Mantaline began to perform, but the court fails to see how this timing issue

changes the disposition of this case. PPG's argument, after all, rests on technical language in forms which the parties probably never read. PPG does not dispute that it was, at some point, in possession of Mantaline's quotation form. If PPG wishes to argue that Mantaline should have carefully read and rejected any terms in the purchase order which it did not accept, then PPG should be held to the same standard with respect to Mantaline's quotation form, despite the fact that the form was not, technically, an offer. PPG, then, should have been aware that Mantaline conditioned its acceptance of any offer an the application of the terms in its quotation form. The court holds, therefore, that the writings in this case do not create a contract between the parties. The contract, like the one in McJunkin, was created by the conduct of the parties.

E.

Because the writings do not create a contract in this case, a direct application of O.R.C. § 1302.10(C) leads the court to the conclusion that arbitration and indemnification clauses contained only in PPG's purchase order and not in Mantaline's quotation form are not part of the enforceable contract between PPG and Mantaline. This conclusion is

supported by Official Comment 7 to the U.C.C[3] In that comment, the drafters of the U.C.C. stated:

> In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made, in such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection 3 [O.R.C. § 1302.10(C)] furnishes the governing rule.

Comment 7, U.C.C. § 2-207. Thus, the comment suggests that in the instant situation, i.e., where the dispute arises after the goods have been delivered and paid for, this court should focus less on a mechanical application of the rules of offer and acceptance, but rather should apply the rules of construction

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[3]A review of the opinions interpreting Ohio's version of the U.C.C. demonstrates a willingness by the courts to rely on the official comments as promulgated under the U.C.C. See, e.g. Ohio Savings Bank v. H.L. Vokes Co., 54 Ohio App.3d 68, 72 (Cuyahoga Cty. 1989); Black River Lumber & Supply Co. v. Darakis Corogin, 1981 WL 3912, at *2 (Lorain Cty. 1981); Standard Alliance Indus., Inc. v. Black Clawson Co., 587 F.2d 813, 825 (6th Cir. 1978), cert. denied, 441 U.S. 923 (1979), rejected by, Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co., 42 Ohio St.3d 40, 52-53 (1989); Cissell v. First Nat'l Bank of Cincinnati, 476 F.Supp. 474, 490 (S.D. Ohio, 1979).

furnished in O.R.C. § 1302.10(C). This approach corresponds well with the purpose of the drafters of the U.C.C. who "intended to change the common law in an attempt to conform contract law to modem day business transactions [wherein] businessmen rarely read the terms on the back of standardized forms[.]" Leonard Pevar Co. v. Evans Products Co., 524 F.Supp. 546, 551 (D. Del. 1981). As such, PPG cannot enforce these clauses against Mantaline.

II.

Because the court finds that PPG may not enforce its arbitration clause against Mantaline, this issue is rendered moot. However, the court echoes its finding its in earlier order that, in the event that the arbitration clause would have been enforceable, PPG does not appear to have waived its fight to enforce such clause.

Conclusion

Plaintiff's motion for summary judgment is granted. Accordingly, this action is dismissed.

/s/_____
Judge Sam H. Bell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed November 19, 1997]

Case No. 5:95 CV 612

MANTALINE CORPORATION,
Plaintiff,

v.

PPG INDUSTRIES, INC.,
Defendant.

ORDER

The court has filed its order of decision in the above-captioned matter, effectively concluding this case. Accordingly, this action is hereby terminated pursuant to Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

/s/
Judge Sam H. Bell
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 27, 2000]

No. 97-4473

MANTALINE CORPORATION *Plaintiff-Appellee*,	)
v.	)
PPG INDUSTRIES, INC., *Defendant-Appellant*,	)
AMERICAN ARBITRATION ASSOCIATION, INC., *Defendant*.	)

ORDER

BEFORE: NELSON, SILER, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Siler would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 16, 2000]

No. 97-4473

MANTALINE CORPORATION *Plaintiff-Appellee*,	)
v.	)
PPG INDUSTRIES, INC., *Defendant-Appellant*,	)
and	)
AMERICAN ARBITRATION ASSOCIATION, INC., *Defendant*.	)

On Appeal from the United States District Court
for the Northern District of Ohio,
Eastern Division (Akron)

PLAINTIFF APPELLEE'S PETITION FOR REHEARING EN BANC

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I. FRAP 3505) STATEMENT

Plaintiff-Appellee Mantaline Corporation ("Mantaline") petitions this Court for a rehearing *en banc* of Defendant-Appellant PPG Industries, Inc.'s ("PPG") Appeal, that was resolved 2-1 in PPG's favor, because the proceeding involves a question of exceptional importance to interstate commerce. The question presented is whether Uniform Commercial Code ("UCC") § 2-207(3)[1] should be interpreted to apply only when the Seller's writing may be construed as an "offer" or whether it must be interpreted to apply whenever the parties' writings do not establish a contract, and their conduct recognizes the existence of a contract.

This question arises because the majority panel's decision directly conflicts with authority from another circuit court. *Axelson, Inc. v. McEvoy-Willis,* 7 F.3d 1230, (5th Cir. 1993). The majority panel's decision also conflicts with this Court's decision in *McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481 (6th Cir. 1989). That conflict indicates that consideration by the full court is necessary to secure and maintain uniformity of the decisions of this Court.

II. ARGUMENT

A. Introduction. This case presents a question of exceptional importance to interstate commerce because the majority panel's decision interprets UCC § 2-207(3) in a way that limits its application to situations

---

[1] UCC § 2-207(3) is codified in Ohio as Ohio Rev. Code § 1302.10 (C).

where the Seller's writing may be construed as an "offer". A plain reading of the words of this code section reveal that no such limitation exists.

The exceptional importance of UCC § 2-207(3)'s proper interpretation is presented by its appropriate application whenever merchants buy and sell products from each other without first signing an agreement for that purchase and sale. *See McJunkin Corp., supra.* That application, based upon its codification into the commercial law statutes of all 50 states, says that it shall be used whenever: "[c]onduct by both parties that recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract." UCC § 2 - 207(3). It continues: "In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

It has always been the hallmark of statutory interpretation that "[t]he language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear." *U.S. v. Choice,* 99-1609 (6th Cir. 1999), citing *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989). The majority panel's interpretation of UCC § 2-207(3) and decision in this case ignores this rule.

The majority decision in favor of PPG turned on its determination that Mantaline's quotation to sell gaskets to PPG was a solicitation for an offer, that PPG's purchase order to Mantaline in response to that quotation allowed acceptance

by performance, and that Mantaline's shipment of gaskets resulted in a contract based only on PPG's terms and conditions. This analysis ignores the fact that Mantaline's quotation contained detailed terms and conditions of sale related to warranty terms, force majeure relief and said that it *only* wanted to do business on its terms and conditions. Mantaline's quotation also stated that it expressly rejected any contrary terms and conditions contained in a responsive purchase order, which would necessarily include the arbitration clause in PPG's purchase which it seeks to impose in this litigation. With this decision, the majority has returned companies doing business in this Circuit, whose "quotation form" terms and conditions do not satisfy the formal requisites of a common law "offer", or who do not send an order acknowledgment with their proposed terms and conditions, to the "last shot", counter-offer approach. This approach, which is described in *Roto-Lith Ltd. v F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962), was criticized by Professors White & Summers in the often cited treatise, *The Uniform Commercial Code* and ***rejected*** by this Court in *McJunkin Corp., supra.*

B. The Majority's Decision Conflicts with Fifth Circuit Authority. The facts of that Fifth Circuit authority are materially identical to those presented by this case. In *Axelson, supra,* the seller (Axelson) submitted a quotation to the buyer (McEvoy) in response to a request for a quotation. Axelson's quotation form contained a provision which the 5th Circuit said could be construed as making it a non-offer. McEvoy's responsive purchase order stated that only its terms and conditions should apply to its order. McEvoy's purchase order also contained a provision that limited Axelson's remedy in the event that McEvoy canceled its order before

that order was completed. When Axelson sued McEvoy for breach of contract in connection with its early cancellation before order completion, McEvoy wanted its purchase order terms and conditions to apply to the dispute. The 5th Circuit rejected that approach.

In reaching that result, the Court noted that, "[e]ven if McEvoy is correct (about Axelson's quotation not being an offer), though, it cannot reach the result it wants. The quotation would not be an offer but the terms on which McEvoy was invited to make its offer were still clear enough." 7 F. 3d at 1233. The 5th Circuit then proceeded to say that the result would be the same, even if the writings of the parties do not form a contract, because McEvoy's purchase order terms came after the essence of its deal with Axelson had been agreed upon, and because of the application of UCC § 2 - 207(3).

C. The Majority's Decision Conflicts with Sixth Circuit Authority. In *McJunkin Corp., supra,* there was not even an "exchange" of offer forms to raise the classic battle of the forms. Rather, the buyer forwarded a purchase order which stated that performance constitutes acceptance, and the seller then shipped. Several days *after performance,* however, the seller sent an order acknowledgment form containing new terms. In considering the import -- if any -- of the post performance acknowledgment, this Court could have chosen the *Roto-Lith* analysis -- *i.e.* that the seller's shipment constituted acceptance of buyer's purchase order terms and the acknowledgment was without significance.

This Court, however, rejected that analysis, despite the fact that the Seller's form expressly stated shipment was

both acceptance and assent to terms. The *McJunkin* Court held, rather, that the seller's shipment constituted an intent to bind itself to the seller's terms, as each party expressed that it wanted its own terms. Thus, this Court reasoned, "no contract was created by virtue of the exchanged documents." *Id.* at 488. Because the conduct showed an agreement, however, resort was made to UCC § 2-207(3) to determine the terms of the contract -- those provisions upon which the parties agreed. *McJunkin Corp.*, 888 F.2d 481.

As noted by the District Court Judge in his use of UCC § 2-207(3) below, its application should not be dependent upon when the writings between the seller and buyer are exchanged or their form. What matters is that those writings do not establish a contract, but that the seller's and buyer's conduct do recognize a contract between them. This analysis is consistent with the majority's judgment, that contract formation resulted not from the parties' writings, but Mantaline's performance. That determination, and the parties' recognition of a contract, should have resulted in the application of UCC § 2-207(3).

D. Application of UCC § 2 - 207(3) Is Not Dependent Upon Proposed Terms in an Offer or Order Acknowledgment. The premise of the majority's judgment is that UCC § 2-207(3) is only triggered if an offer is made and the purported acceptance thereto does not operate as an acceptance pursuant to UCC § 2-207(1), and the parties nonetheless perform. In this regard, the majority relies on several cases that stand for the proposition that there must be at least one common law offer before a "battle of the forms" can arise. *E.g., Litton Microwave Cooking Products v. Leviton Manufacturing Co., Inc.* 15 F.3d 790 (8th Cir. 1994).

This proposition is not supported by the plain language of UCC § 2-207(3).

Reading the plain language of UCC § 2-207(3) demonstrates that it does not contain *any* text that makes it dependent on subsections (1) or (2), the existence of one or more offers; nor does UCC § 2-207(1) refer to subsection (2). Additionally, UCC § 2-207 subsections (1) and (2) both use the term "offer," while subsection (3) uses the much broader term "writings." UCC § 1-201(46) defines "writing" to include "printing, type-writing, or any other intentional reduction to tangible form." The majority's judgment acknowledges that: (a) Mantaline's quotation form was a writing to which PPG replied with its purchase order form (another writing), and that these writings were then followed by Mantaline's shipment of and PPG's payment for gaskets. Thus, UCC § 2-207(3) should be applied to the facts of this case, where parties have exchanged *writings,* those writings do not establish a contract but the parties' conduct recognizes the existence of a contract.

Application of UCC § 2-207(3), therefore, would result in a finding that a contract existed between the parties not by virtue of their writings, but their performance and the arbitration clause contained in PPG's purchase order would necessarily be excluded as a provision to which both parties did not agree. The parties' contract would consist of agreed upon terms, and those additional provisions provided by the Uniform Commercial Code.

III. CONCLUSION

Since the majority's judgment in this case conflicts with this Court's decision in *McJunkin,* and the 5th Circuit's authority in *Axelson, supra,* consideration by the full court is necessary to resolve those conflicts, and to secure and maintain uniformity, Mantaline prays that the full Sixth Circuit Court consider the within appeal, and grant Mantaline's Petition for a Rehearing *en banc.*

Respectfully Submitted,

/s/_____

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APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Dated June 15, 1998]

No. 97-4473

MANTALINE CORPORATION
Plaintiff-Appellee,

v.

PPG INDUSTRIES, INC.,
Defendant-Appellant,

and

AMERICAN ARBITRATION ASSOCIATION, INC.,
Defendant.

BRIEF OF APPELLEE

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Cir. R. 25, Plaintiff-Appellee, Mantaline Corporation, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? **NO**

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? **NO**

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

/s/_____ 6/15/98
Stewart D. Roll (#0038004) Date
Jeffrey A. Shapiro (#0061405)
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The central issue in this case is whether the District Court properly determined that Ohio Revised Code § 1302.10(C) prevents Appellant PPG Industries, Inc.'s ("PPG") purchase order provisions, which conflict with those contained in Appellee Mantaline Corporation's ("Mantaline") quotation, from becoming the sole terms and conditions applicable to their contract for the sale and purchase of window gaskets. PPG also claims that the District Court erred by declining to transfer this case, to the Western District of Pennsylvania.

STATEMENT OF THE CASE

I. Nature of the Case.

This matter is, procedurally, an action for declaratory and injunctive relief; yet, at its core, it is a "battle of the forms" case. The battle is presented by Appellant PPG Industries, Inc.'s 1986 purchase of gaskets from Appellee Mantaline Corporation. PPG asks this Court to find that PPG's purchase order provisions are the only terms and conditions applicable to the transaction. Mantaline advocates that this Court affirm the District Court's determination which rejected PPG's argument, and declared that PPG may not unilaterally impose its purchase order terms upon Mantaline, when Mantaline did not agree to those terms and had previously proposed terms and conditions to PPG in a quotation for the sale of those gaskets.

In reaching its decision, the District Court considered that there was no signed contract between PPG and Mantaline, yet the parties had exchanged quotation and purchase order forms without discussion or negotiation -- which forms both insisted that only their terms and conditions should govern the vendor and vendee relationship. Against this background, and the performance by PPG and Mantaline, the District Court properly determined that Ohio Revised Code § 1302.10(C) applied and prevented application of PPG's purchase order arbitration and indemnification terms to its relationship with Mantaline.

II. Course of the Proceedings and Disposition by the District Court.

On or about October 22, 1992, PPG was sued by Security Life of Denver Insurance Company in the U.S. District Court for the District of Colorado, Case No.: 92-F2098 (the "Colorado Case"). (R. 69, Mantaline's Motion for Summary Judgment pp. 4, 33; JA 192, 219). Security Life's Complaint alleged numerous defects in PPG's windows. During the course of the Colorado Case, PPG sought to add Mantaline as a third-party defendant, as the supplier of the gaskets which PPG incorporated into the windows at issue. PPG also successfully sought and received discovery from Mantaline in the Colorado Case.

The Court in the Colorado Case denied PPG's motion to add Mantaline as a party. PPG then settled Security Life's Complaint without consultation with Mantaline, and without any determination by the Court that any party was liable or any product was defective. PPG's settlement with Security Life in the Colorado Case occurred on August 24, 1993.

(R. 69, Mantaline's Motion for Summary Judgment p. 4; JA 188, 192).

Subsequently, on February 9, 1995, PPG made a demand for arbitration upon the American Arbitration Association and Mantaline. PPG's demand served as the triggering event for the case *sub judice*. Mantaline received the demand for arbitration on February 24, 1995. (R. 1, Complaint p. 2 (Exhibit "C" to Notice of Removal); JA 21, 22). In that demand, PPG claimed that, based upon the 1986 purchase order issued to Mantaline for gaskets, it is entitled to arbitration and indemnification from Mantaline for the cost of its settlement of the Colorado Case.

On March 6, 1995, Mantaline responded to PPG's demand by filing its Complaint for Declaratory Judgment and Injunctive Relief, and Motion for Injunctive Relief in the Portage County, Ohio Court of Common Pleas. (R. 1, Complaint; JA 21). Mantaline's March 13, 1995 Amended Complaint (R. 1, Exhibit "I" at pp. 1, 6-7, to Notice of Removal; JA 66, 71-73) sought injunctive relief, and a determination that: (a) Mantaline did not agree to the arbitration of its disputes with PPG, (b) PPG waived its alleged right to demand arbitration from Mantaline, (c) PPG's purchase order which was presented to the American Arbitration Association did not contain a provision entitling it to indemnification from Mantaline, and (d) Mantaline's quotation terms and conditions prevented the application of PPG's purchase order terms and conditions to their relationship. A Temporary Restraining Order was entered on March 6, 1995, prohibiting PPG and the American Arbitration Association from proceeding with arbitration of

PPG's claims against it. (R. 1, Order pp. 1-2 (Exhibit "I" to Notice of Removal); JA 19-20).

On March 16, 1995, PPG removed the case to the United States District Court for the Northern District of Ohio pursuant to 28 U.S.C. § 1441. (R. 1, Notice of Removal; JA 11). On April 3, 1995, PPG moved the Court to transfer this action to the U.S. District Court for the Western District of Pennsylvania (R. 16, Motion to Transtar; JA 134), to compel arbitration, and to dismiss or stay Mantaline's action pending arbitration. (R. 15, Motion to Dismiss. . . , JA 94). On May 31, 1995, the Court held a hearing on Mantaline's Motion for a Preliminary Injunction, and on June 2, 1995, entered an Order advising the parties that PPG's Motion to Dismiss would be treated as a Motion for Summary Judgment. (R. 29, Order p. 2; JA 140-141). On September 25, 1996, the District Court entered an Order which denied PPG's pending motions, and granted Mantaline's Motion for a Preliminary Injunction. (R. 41, Order 12, 14; JA 142, 153, 155).

On May 7, 1997, PPG filed its Amended Answer and Counterclaim. (R. 64, Amended Answer and Counterclaim; JA 172). On June 11, 1997, Mantatine filed its Amended Answer to Plaintiff's Counterclaim. (R. 67, Amended Answer; JA 182).

After the case proceeded through discovery, the parties filed cross Motions for Summary Judgment. (R. 69, Mantaline's Motion for Summary Judgment; JA 188; *See also* R. 71, PPG's Cross-Motion for Summary Judgment; JA 223). In furtherance of the cross Motions for Summary Judgment, on July 21, 1997, the parties submitted stipulated facts (the "Stipulated Facts") to the District Court. (R. 69, Mantaline's

Motion for Summary Judgment, at Exhibit "A" thereto; JA 188, 204).

On November 17, 1997, the District Court entered Summary Judgment for Mantaline, finding that Ohio Revised Code § 1302.10(C) prevented the application of PPG's indemnification and arbitration purchase order provisions to its relationship with Mantaline. PPG timely appealed. (R. 80, Notice of Appeal; JA 91).

III. Facts relevant to the issues presented for review.

As set forth above, in the proceeding before the District Court, the parties stipulated to most of the facts which are now relevant to this appeal. (R. 69, Mantaline's Motion for Summary Judgment, at Exhibit "A" thereto (Stipulation of Facts); JA 188, 204).

In late 1985 or early January 1986, PPG asked several vendors, including Mantaline, to provide it with written quotations ("Written Quotation") for interior and exterior glazing gaskets and related materials (the "Gaskets"). PPG needed the Written Quotation in order to, in turn, support it's own bid to supply windows in connection with the construction of the Security Life of Denver Insurance Company Building in Denver, Colorado (the "Security Life Building").

Upon receiving PPG's request, on a date prior to January 7, 1986, Mantaline sent to PPG a Written Quotation to sell Gaskets to PPG, including terms of sale, on Mantaline's standard form. In fact, Mantaline's Written Quotation expressly states that:

> We are pleased to submit the following quotation, subject to each and every term and condition of sale contained herein and on the reverse side hereof.
>
> . . .
>
> Any order placed in response to this quotation shall be deemed an express acceptance of each and every term and condition of sale contained herein and on the reverse side hereof.
>
> . . .
>
> Modifications, changes, additions, cancellations, or suspensions will not be binding upon us unless accepted by a representative of our Company in writing. . .
>
> . . .
>
> The terms and conditions contained in this quotation shall prevail over any inconsistent terms contained in buyer's purchase order.

(R. 69, Quotation pp. 1-2 (Exhibit "B" to Mantaline's Motion for Summary Judgment); JA 188, 206-07). Mantaline's form did not contain an arbitration or indemnification provision.

On January 7, 1986, following receipt of Mantaline's Written Quotation, PPG sent its purchase order ("Purchase Order") to Mantaline for the quoted Gaskets. PPG's Purchase Order also contains various terms and conditions, many of which conflict with Mantaline's Written Quotation for the Gaskets, including provisions (l) which require its vendors to indemnify PPG from and against all damages, claims, demands, expenses, loss and liability, and (2) that any claim or controversy arising out of or relating to it shall be resolved in Pittsburgh, Pennsylvania or such place as PPG may

designate, pursuant to the rules of the American Arbitration Association. PPG's form also states that its terms are the entire contract between PPG and its vendors, and the form "objects" to any contradictory provision in its vendor's forms.

Despite the exchange of forms, no single document for the Gaskets was ever signed by Mantaline and PPG. Likewise, the parties did not discuss or negotiate the conflicting terms and conditions contained in their respective Written Quotation and Purchase Order forms. After the exchange of writings, Mantaline shipped the Gaskets it quoted, PPG paid for the Gaskets, and PPG apparently used the Gaskets in the 1986 Security Life Building construction project in Denver, Colorado.

SUMMARY OF ARGUMENT

I. The exchange of writings between PPG and Mantaline with respect to the sale and purchase of Gaskets, and the sale and purchase of those Gaskets without negotiation or signature of a contract, triggers the application of Ohio Revised Code § 1302.10(C). That statute provides that where there is no formal contract between merchants for the sale of goods, like the transaction at issue in this case, the contract consists of those terms upon which their writings agree, together with the Uniform Commercial Code's ("U.C.C.") "filler" terms.

The District Court, therefore, properly determined that PPG was not entitled to its Purchase Order provisions requiring arbitration of disputes or Mantaline's

indemnification of PPG, as Mantaline never agreed to those terms.

Application of O.R.C. § 1302.10(C) is not dependant upon both writings being an offer. PPG's claim that it is unaware of precedent to support that view, and that none was mentioned below, is not supported by the record. For example, in several briefs before the District Court, Mantaline cited to *Axelson, Inc. v. McEvoy-Willis,* 7 F.3d 1230 (5th Cir. 1993), which held that O.R.C. § 1302.10(C) may apply without the existence of two offers. *(See, e.g.* R. 73, Mantaline's Reply to PPG's Opposition . . . , at Brief p. 3; JA 242, 245).

Similarly curious is PPG's claim that commerce will be radically changed in this Circuit unless this Court ultimately determines that PPG's Purchase Order terms control its relationship with Mantaline. PPG controls its own commercial destiny. If PPG wants its terms and conditions to apply to any transaction, it need only require its vendors to sign PPG's Purchase Order terms. When commercial parties exchange proposed terms and conditions of a transaction, neither of them should receive all of their terms based upon a technical analysis of which came first or last, or offer and acceptance. That type of analysis in transactions between merchants involving goods has been modified by the Uniform Commercial Code and O.R.C. § 1302.10(C).

II. The Federal Arbitration Act ("FAA") does not change this result. That statute only applies when the parties have agreed to arbitration. Because Mantaline did not agree to, and objected to, PPG's "new terms" -- including the Purchase Order term which provides for dispute resolution by

arbitration, Mantaline cannot be required to resolve this dispute through arbitration. *Mastrobuono v. Shearson Lehman Hutton,* 514 U.S. 52 (1995); *Teramar v. Rodier Corp.*, 40 Ohio App.3d 39 (1987).

If PPG's Purchase Order arbitration provision did apply to its relationship with Mantaline, which is denied, PPG waived its right to arbitration by (1) its attempt to add Mantaline as a third-party defendant to the Colorado Case, (2) conducting discovery against Mantaline in the Colorado Case, and (3) asserting its indemnification Counterclaim in this case. Judicially mandated arbitration in this circumstance would violate Mantaline's right to trial by jury, which is protected by both the Ohio and U.S. Constitutions.

III. The District Court did not abuse its discretion in denying PPG's Motion to Transfer this case to the U.S. District Court for the Western District of Pennsylvania. The District Court properly determined that (1) PPG is a national corporation which maintains offices in this district, (2) there existed a substantial nexus between this district and the merits of this case, and (3) no inconvenience would attach to necessary witnesses. The District Court did not abuse its discretion in overruling that Motion, because there exists a rational basis for the denial of PPG's Motion to Transfer.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN APPELLEE'S FAVOR, CONCLUDING PURSUANT TO O.R.C. § 1302.10(C), THAT THE TERMS OF SALE WHICH PPG SOUGHT TO UNILATERALLY IMPOSE ARE NOT PART OF THIS TRANSACTION.

Appellee Mantaline's Amended Complaint sought injunctive relief and a declaration that PPG does not possess the right to demand indemnification from, make warranty demands of, or secure the arbitration of its claims against Mantaline. The basis of Mantaline's position is that such terms are not part of the parties' transaction. Resolution of these issues depends upon what terms and conditions apply to Mantaline's sale and PPG's purchase of Mantaline's Gaskets during January 1986.

That sale and purchase was preceded by PPG's request to Mantaline for a proposal to sell Gaskets, and Mantaline's Written Quotation or offer to sell those Gaskets. Mantaline's offer contained a provision which rejected any new terms and conditions proposed by PPG in any to-be-issued Purchase Order. Therefore, arbitration and indemnification terms did not become part of the contract, pursuant to O.R.C. § 1302.10(A)-(B). *See, Axelson,* 7 F.3d at 1233-34 (finding that a quotation similar to Mantaline's was, in fact, an offer).

Alternately, even if Mantaline's Quotation was not an offer, the application of O.R.C. § 1302.10(C) is triggered because the writings of the parties do not otherwise establish

a contract, and both parties recognized the existence of a contract. Under O.R.C. § 1302.10(C), Ohio's legislature has determined that in a case like this, courts should find that the terms of the contract only consist of the terms on which the "writings" of the parties agree, together with the U.C.C.'s "filler" provisions. Indeed, as the District Court found in its September 25, 1996 Order granting Mantaline's Motion for Preliminary Injunction:

> . . .The conduct of the parties in this case evidences a contract, and the only two writings exchanged by the parties do indeed fail to establish a contract by themselves, thus Plaintiff concludes [and the court agrees] that the contract terms are limited to those found in both writings. . .
>
> . . . Applying O.R.C. § 1302.10(C) to the writings in the instant case, the court compares the terms of Mantaline's quotation and PPG's purchase order, and finds that the two contracts do not agree on the inclusion of PPG's warranty and arbitration clauses. Thus, pursuant to subsection C [of O.R.C. § 1302.10], the two clauses in question would not be considered part of the contract between the two parties.

(R. 41, Order pp. 7-8, *(Mantaline Corp. v. PPG Industries, Inc.*, No. 5:95CV612 (N.D. Ohio September 25, 1996)); JA 142, 148-49).

A. When the parties' writings do not form a contract, and their conduct recognizes the existence of a contract, the terms on which the "writings" of the parties agree determine the contract.

This case turns on the interpretation of O.R.C. § 1302.10(C), which provides as follows:

> Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale **although the writings of the parties do not otherwise establish a contract. In such cases the terms of the particular contract consist of those terms on which the writings of the parlies agree, together with any supplementary terms incorporated under other provisions of. . . [the UCC].**

O.R.C. § 1302.10(C) (emphasis added).

Given the intended commercial setting of O.R.C. § 1302.10(C), Official Comment No. 7 of the UCC's Editorial Board provides, perhaps, the best explanation of the purpose of that section:

> In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. **In such cases, where the writings of the parties do not establish a**

> **contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. See Section 2-204. The only question is what terms are included in the contract, and subsection (3) [O.R.C. § 1302.10(C)] furnishes the governing rule.** (Emphasis Added).[1]

Since the *writings* of the parties do not establish a contract, Mantaline's Written Quotation Form and PPG's Purchase Order terms and conditions are like two ships passing in the night. Nonetheless, both entities recognized the existence of a contract; Mantaline by shipping Gaskets, and PPG by paying for them.

PPG argues to this Court that notwithstanding O.R.C. § 1302.10(C) and its drafters' use of the broad word "writings", this Court should blindly conclude that the writing which Mantaline thought was an offer is not actually an *offer* under the common law, and then reflexively apply the common law "mirror image rule: in order to entirely ignore the existence of Mantaline's writing from the analysis of to

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[1] Ohio's courts look favorably upon and have adopted these Official Comments, *e.g., Ohio Sav. Bank v. H.L. Vokes Co.*, 54 Ohio App.3d 68, 72 (1989). Pursuant to the seminal case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), it would be appropriate for this Court to apply those comments herein cited, because in a diversity action such as the case *sub judice*, the Federal Courts are bound to apply the law of the forum State as they find it. *See also, Bacik v. Peek*, 888 F. Supp. 1405, 1408 (N.D. Ohio 1995).

what the parties actually agreed. By so excluding Mantaline's Written Quotation, PPG would have the Court find a contract far different from that to which Mantaline agreed. It would imply an acceptance in a situation where Mantaline did not accept. In fact, in the Stipulated Facts, PPG admits there were "no oral or written communications about the terms and conditions" contained in the forms.

PPG's approach also ignores the plain language of the Code and its intended commercial setting. Indeed, because there is no express contract, Mantaline's Written Quotation must be considered. In this case, as in typical commercial negotiations, the first writing clearly identified the parameters under which Mantaline would sell its Gaskets, and objected to any additions to, or modifications of, Mantaline's terms. In considering a similar case, the Fifth Circuit Court of Appeals recently noted that even if a proposal such as Mantaline's might not have technically been "an offer, but the terms on which the [party receiving the quotation] was invited to make its offer were still clear enough." *Axelson,* 7 F.3d at 1233-34 (finding a quotation similar to Mantaline's was, in fact, an offer). Mantaline contends that any analysis which completely ignores its Quotation -- which at a minimum must put the buyer on notice of the terms to which Mantaline believed it would be bound -- is to entirely ignore commercial reality.

B. This court and leading commentators have rejected the doctrine of contract formation based on the last document sent, in favor of the commercial reality reflected by O.R.C. § 1302.10(C).

Both this Circuit and leading commentators favor the above approach, and specifically admonish the common law approach that O.R.C. § 1302.10(C) was intended to obviate. For instance, in their often cited treatise, *The Uniform Commercial Code,* Professors White and Summers note the example of the case where a Seller sends a Buyer its forms. *See* White and Summers, The Uniform Commercial Code, § 1-2, at 4 (pp. 29-30) (1972). Buyer in turn responds with its own form, and then Seller performs. Professors White and Summer explain that under the common law approach, best exemplified by the *Roto-Lith Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (lst Cir. 1962), "the second document is a counter-offer and [the common law therefore] holds that subsequent performance by the party who sent the first document constitutes acceptance. This approach gives one party (*who fortuitously sent the second document*) all of his terms. *The Code draftsmen have chosen not to take this approach . . .*" *See* White and Summers, *supra.*

In *McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481 (6th Cir. 1989), this Court implicitly adopted the position of U.C.C.'s Editorial Board and declined to follow the common law approach holding that because a "contract existed by virtue of the parties' conduct, not by virtue of an exchange of forms, . . . [U]nder O.R.C. § 1302.10(C), the 'contract'

incorporated only those terms upon which both parties' . . . forms agreed." *Id.*, 888 F.2d at 483, 488.

In *McJunkin Corp., supra,* there was not even an "exchange" of offer forms to raise the classic battle of the forms. Rather, the buyer forwarded a purchase order which stated that performance constitutes acceptance, and the seller then shipped. Several days *after performance,* however, the seller sent an order acknowledgment form containing new terms. In considering the import -- if any -- of the post performance acknowledgement, this Court could have chosen the *Roto-Lith* analysis -- *i.e.* that the seller's shipment constituted acceptance of buyer's purchase order terms and the acknowledgement was without significance.

This Court, however, rejected that analysis despite the fact that the buyer's form expressly stated shipment was both acceptance and assent to terms. The *McJunkin Corp.* Court held, rather, that the seller's shipment was not an intent to bind itself to the buyer's terms, as each party expressed that it wanted its own terms. Thus, this Court reasoned, "no contract was created by virtue of the exchanged documents." *Id.* at 488. Because the conduct showed an agreement, however, resort was made to O.R.C. § 1302.10(C) to determine the terms of the contract -- those upon which the parties agreed. *McJunkin Corp.*, 888 F.2d 481. *See also In re Barney Schogel, Inc.*, 12 B.R. 697 (Bankr. S.D.N.Y. 1981) (rejecting performance as acceptance in light of on going negotiations, and after finding no signed contract resorting to UCC § 2-207(3)).

Other courts also similarly have held that common law contract formation is not in accordance with modern day

business transactions where business persons rarely read standardized forms. *Leonard Pevar Company v. Evans Product Co.*, 524 F. Supp. 546 (D. Del. 1981) (indicating that UCC § 2-207(3) [O.R.C. § 1302.10(C)] should apply). Thus, the purpose of UCC § 2-207(3) is to prevent one party from imposing unilateral contract terms and conditions upon his counterpart, *Id.*

Ohio precedent is in accord with the *McJunkin* result. In *Alliance Wall Corp. v. Ampat Midwest,* 17 Ohio App.3d 59 (1984), resort was made to O.R.C. § 1302.10(C) to determine the content of the parties' contract. In so holding, the Cuyahoga County Court of Appeals cited favorably from White & Summers, *The Uniform Commercial Code,* § 1-2 (2d Ed. 1980) in relevant part as follows:

> If on the other hand, the parties perform and the question arises as to what the contract is, we would proceed directly to subsection [C]. There, as we have seen, the parties will get the terms on which their documents agree plus those that the Code offers.

In application to the case at bar, the parties' writings did not form a contract. No contract was signed, and no "intent" to be bound to the other's terms is manifested. Yet, their conduct recognizes the existence of a contract -- *i.e.* shipment and payment. Under O.R.C. § 1302.10(C), therefore, the parties' *writings* must be considered and only those terms upon which they agree are considered part of the contract. Here, PPG asserts a right to arbitration and indemnification. No such rights or clauses appear in

Mantaline's Written Quotation. The contract, therefore, does not contain those terms.

In absence of those terms, PPG is not entitled to arbitration (Count I of Mantaline's Amended Complaint), PPG is not entitled to indenmification for any loss or cost incurred in resolving the Security Life litigation in Colorado (Count III), and the terms of PPG's Purchase Order -- to the extent such are inconsistent with Mantaline's writing, such as indemnification, are not part of the parties' contract.

In its Brief, PPG asserts several arguments regarding the interpretation and relationship of O.R.C. § 1302.09 and O.R.C. § 1302.10, which are inconsistent with the purpose and goal of the UCC. These arguments will be addressed below *ad seriatim*.

C. O.R.C. § 1302.10(C) is not dependent on the existence of two common law offers.

The thrust of PPG's argument is that O.R.C. § 1302.10(C) is only triggered if an offer is made and the purported acceptance thereto does not operate as an acceptance pursuant to O.R.C. § 1302.10(A), and the parties nonetheless perform. In this regard, PPG relies on several cases that stand for the proposition that there must be two common law offers before a "battle of the forms" can arise. *E.g., Litton Microwave Cooking Products v. Leviton Manufacturing Co., Inc.*, 15 F.3d 790 (8th Cir. 1994). PPG further argues that O.R.C. § 1302.10(C) does not stand alone and must instead be applied only when required by O.R.C. § 1302.10(A).

PPG's proposition, and the cases upon which it relies, however, ignore the plain language of the statute. O.R.C. § 1302.10(C) does not contain *any* text that makes it dependent on subsections (A) or (B), the existence of two offers, nor does § 1302.10(A) refer to subsection (C). Additionally, subsections (A) and (B) both use the term "offer," while subsection (C) uses the much broader term "writings." O.R.C. § 1301.01(TT) defines "writing" to include "printing, type-writing, or any other intentional reduction to tangible form."

Thus, O.R.C. § 1302.10(C) applies precisely to the situation involved herein, when parties have exchanged *writings*, but neither of those writings establish a contract. *See Mantaline Corp. v. PPG Industries, Inc.*, No. 5:95 CV 612 (N.D. Ohio September 25, 1996) (R. 41, Sept. 25, 1996 Order; JA 142, 148). The case law cited by PPG also is in direct conflict with Official Comment No. 7 to O.R.C. § 1302.10(C), as PPG's reading of this statute would reinstate the "last shot" rule.

PPG also argues that it is unaware of any decision where a Court has applied a § 2-207(3) (O.R.C. § 1302.10(C)) analysis to two writings when one of those writings was not an offer or a confirmation which proposed or "offered" new contract terms. However, as Mantaline cited in several of its briefs before the District Court, in *Axelson, Inc. v. McEvoy-Willis*, the Fifth Circuit reasoned in a similar case that "although a proposal might not technically have been an offer, the terms on which the [party receiving the quotation] was invited to make his offer was still clear enough", such that the transaction would be governed by UCC § 2-207(3) (O.R.C. § 1302.10(C)). *See, Axelson*, 7

F.3d at 1233-34. Moreover, Mantaline's position furthers the UCC's goal of reflecting the realities of modern business transactions, eliminating the "last shot" rule, and not giving one party all of its terms by mere chance. Alternatively, as will be set forth below, several cases also have held that a purchase order sent in response to a definite quotation serves as an acceptance of the terms of the quotation.

D. O.R.C. § 1302.09 is not applicable to the case *sub judice*, because two conflicting writings proposing contract terms were exchanged by the parties.

PPG also argues that O.R.C. § 1302.09 should be restrictively applied against Mantaline, the purported acceptor of PPG's Purchase Order, thus making performance under O.R.C. § 1302.09 paramount to the terms of O.R.C. § 1302.10. An analysis of this issue must begin with the text of O.R.C. § 1302.09(A), which provides in pertinent part as follows:

> Unless otherwise unambiguously indicated by the *language* or *circumstances;* (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances; (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of . . . goods, . . .

The purpose of O.R.C. § 1302.09, therefore, is to liberalize the common law mirror image rule to allow acceptance in any reasonable manner under the circumstances, including performance. That does not, however, logically mean that the reverse is true; performance is not necessarily acceptance of the last document sent. If such were the case, O.R.C. § 1302.10(C) would be rendered meaningless because every performance would then be deemed an express acceptance of the last document sent. Such interpretation would effectively reinstate the "last shot" rule -- precisely the result the Code was intended to prevent.

Indeed, O.R.C. § 1302.09(A) applies to prevent the situation described by many commentators as the "unilateral contract trick," which is involved when there is only one form involved in the transaction. *See* White and Summers, *The Uniform Commercial Code* at § 1-4, p. 35. Under the common law, a buyer would send a seller a contract, the seller would then ship non-conforming goods, and when sued by the buyer, assert that there was no contract because the shipment of the goods, which was non-conforming, was not the act called for as acceptance by the offer. UCC § 2-206 (O.R.C. § 1302.09) holds such a seller to a contract; his performance was clearly an acceptance of and responsive to the seller's offer -- the *only* "writing" purporting to contain the terms of the transaction. *Id.*

O.R.C. § 1302.09, therefore, does not apply to the situation involved herein – *i.e.* there has been an exchange of writings such that each party believes performance is fulfillment of the terms contained in its own writing. This latter situation -- subject of the case *sub judice* -- is governed by O.R.C. § 1302.10(C). *See* White and Summers, at § 1-4,

p. 36 (1972). In fact, the District Court noted -- and properly so -- in its November 19, 1997 Order, that Mantaline's shipment was not an assent to PPG's order form and terms. (R. 78, November 19, 1997 Order p. 11; JA 77, 87).

At most, Mantaline's shipment merely can be "conduct . . . that recognizes the existence of a contract . . . [which] . . . is sufficient to establish a contract for sale when the writings of the parties do not otherwise establish a contract", *see*, § 2-207(3), and certainly not conduct which indicates acceptance of PPG's terms. Had Mantaline not issued its writing proposing specific terms of sale, then O.R.C. § 1302.09 might apply. However, as the District Court properly found, because Mantaline did so, this is not a O.R.C. § 1302.09 case, but one governed under O.R.C. § 1302.10(C). Again, Mantaline is not attempting the unilateral contract trick; it does not dispute there is a contract. Mantaline simply disputes that the parties' writings independently establish the contract.

In fact, if O.R.C. § 1302.09 were applied in this case it would establish that PPG's tender of the Purchase Order was an acceptance of Mantaline's Quotation. For instance, in *Editors Press, Inc. v. United States*, 414 F. Supp. 407 (D. Md. 1975), the District Court noted that commercial reality and the UCC's admonition to have its words "liberally construed and applied to promote its underlying purposes and policies" require a court to distinguish between "a mere quotation of price" leaving important terms unexpressed, and a specific quote made in detail and in response to previous discussions. *Id.* at 416-17 (citing 1 A. Corbin, Contracts § 26 at 77-78 (1963)). The *Editors Press* Court held that the issuance of a purchase order in response to a specifically

prepared and definite price quotation was an acceptance of the quotation, thereby forming a binding contract at that time. The Court reasoned, that:

> Common sense and commercial realities make it clear that April 15, 1969 [the date the responsive purchase order was issued] was the date upon which a "binding contract". . . came into effect.

Editors Press, 414 F. Supp. at 417. *See also, Crest Ridge Construction Group, Inc. v. Newcourt, Inc.*, 78 F.3d 146 (5th Cir. 1996) (purchase order deemed acceptance of definite price quotation); *Wisconsin Electric Power Co. v. Zallea Bros., Inc.*, 443 F.Supp 946, 950 (E.D. Wis. 1978) (purchase order deemed acceptance of definite price quotation).

II. PPG IS NOT ENTITLED TO ARBITRATION BECAUSE MANTALINE NEVER AGREED TO ARBITRATION; ALTERNATELY, PPG WAIVED ARBITRATION BY ITS ACTIONS.

Because the "contract" does not include an arbitration clause, Count II of the Amended Complaint is rendered moot in Mantaline's favor -- the question of whether PPG waived its right to arbitration would only be relevant if PPG had such right in the first instance. As set forth above, it did not. Moreover, in absence of an agreement or contract provision, there is no general right to arbitration. *See, Mastrabuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995). A party, therefore, "may not be required to submit to arbitration any dispute which he has not agreed to submit." *Smith Barney, Inc. v. Sarver*, 108 F.3d 92 (6th Cir. 1997). Conversely,

requiring a party to submit a claim to arbitration without, agreement denies that party its right to a trial by jury as guaranteed by Amendment VII to the Constitution of the United States of America and Article I, §§ 5 & 10 of the Constitution of the State of Ohio.

Furthermore, it is for the *Court* to determine whether the controversy is arbitratable under the contract. *Siam Feather & Forest Products Company, Inc. v. Midwest Feather Company*, 503 F. Supp. 239, 242 (S.D. Ohio 1980).

Even if this Court should conclude that Mantaline did have an obligation to participate in arbitration -- which Mantaline denies -- it is well settled that the right to arbitrate can be waived like any other contract right. *Central Trust Company, N.A. v. Anemostat Products Division*, 621 F. Supp. 44, 46 (1995). The waiver may be express or it may be implied when the party actively participates in litigation *or* acts inconsistently with its rights to proceed with arbitration. *Siam Feather*, 503 F. Supp. at 242.

The filing of a responsive pleading constitutes such a waiver. *Central Trust*, 621 F. Supp. at 46. Equally important, where a case has been long standing in the courts, *i.e.* 19 months, and is ready for trial, a court should not dismiss an action to force arbitration because doing so would just cause further delay. *Id.* Referral at such a late stage would undermine Congress's goal in enacting the Federal Arbitration Act ("FAA") of expediting the resolution of disputes. *Id.* at 46 (*citing* the FAA, *i.e.*, 9 U.S.C. § 3, 4, *et seq.)*.

Ohio's courts also have held that discovery alone, if used to the disadvantage of a party, can constitute a waiver of arbitration. *See, e.g., Standard Roofing, v. John G. Johnson & Sons Construction,* 54 Ohio App.2d 153 (1977); *Cf Central Trust,* 621 F. Supp. at 46 (noting that the advanced stage of discovery supported a finding that arbitration had been waived). Authority also exists for the propositions that the filing of suits, and negotiations between the parties over an extended period of time before arbitration is demanded, can both result in a waiver of a right to arbitration. *Jones v. Honchell,* 14 Ohio App.3d 120 (1984).

In application to the case at bar, PPG's activities of securing discovery from Mantaline in the *Security Life,* federal court litigation and attempting to join Mantaline as a third-party to that litigation both establish PPG's intent to forego its purported right to arbitration.

Of greater importance in the instant case, PPG has filed a responsive pleading in the District Court which includes a Counterclaim against Mantaline on the merits of the underlying claim. Its Amended Counterclaim, moreover, does not include a claim concerning arbitration as did its original Counterclaim. The parties have also engaged in substantial discovery which included the exchange of several sets of Interrogatories, Requests for Admissions, and Requests for Production of Documents. Formal testimony was also taken in connection with Plaintiff's Motion for a Preliminary Injunction.

PPG's involvement in these numerous Court processes must constitute an actual waiver of its purported right to arbitration. Conversely, even if PPG were to argue that

notwithstanding its uses of the Court's processes that it did not intend a waiver, equity inust require a waiver given that a referral at this juncture -- more than three years after the commencement of this proceeding -- would simply not achieve the goals of the Arbitration Act. *See, Central Trust,* 621 F. Supp. at 46.

III. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO TRANSFER THIS CASE.

In its brief, PPG argues that "Pennsylvania is the most *appropriate* forum for this matter," and that "it would be *consistent* with the interests of justice to transfer this case to Pennsylvania. . . ." From these conclusory -- and unsupported statements -- PPG concludes that the District Court erred in not transferring the litigation to the Western District of Pennsylvania pursuant to 28 U.S.C. 1404(a), and that the District Court's decision not to do so was an abuse of discretion. PPG's conclusory assertions -- even if true -- do not warrant 28 U.S.C. § 1404(a)'s application. 28 U.S.C. § 1404(a) provides that:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfier any civil action to any other district or division where it might have been brought.

It is well settled that the burden of establishing that there should be a transfer is on the moving party, who must make a *convincing* showing of the right to a transfer. *Factors, Inc. v. Pro Arts, Inc.,* 579 F.2d 215 (2d Cir. 1978).

In considering a transfer, a court should consider the plaintiff's choice of forum, the location of books and records, and the convenience of the witnesses. *Bacik v. Peek,* 888 F. Supp. 1405 (N.D. Ohio 1995). The most important factor is the convenience of witnesses. *Id.* at 1414. Obviously, therefore, the moving party must identify the key witnesses. *Id.* at 1415.

Other considerations with respect a Motion to Transfer are: (1) ease of access to sources of proofs, (2) availability of compulsory process for attendance of unwilling witnesses, (3) cost of obtaining attendance of willing witnesses, and (4) the possibility of the view of the premises. *Chicago, Rock Island and Pacific R.R. v. Igoe,* 220 F.2d 299 (7th Cir. 1955), *cert. denied,* 350 U.S. 822 (1955).

After all the factors are weighed, however, "all relevant factors must weigh 'strongly in favor of transfer.'" *Bacik*, 888 F. Supp. at 1414. Moreover, the convenience must be to the parties -- not just the defendant or party requesting the transfer. *Id.* Where a moving party argues for *its* convenience, but fails to establish that a reciprocal inconvenience will not just be transferred to the other party, transfer is unwarranted. *Id.*

PPG does not meet any of the criteria -- and certainly not with evidence that is so clear and convincing that it can be said that the District Court abused its discretion. In fact, PPG does not identify one witness or piece of evidence relevant to this matter. Other than conclusory statements, no factual basis of inconvenience is mentioned.

PPG's only argument is that transfer is appropriate because allowing the case to be heard in the District Court below allows Mantaline to "modify" the contract. This circular argument is logically flawed in that it assumes what it purports to prove. The District Court has already concluded the contract which PPG claims will be modified does not exist as PPG claims. Thus, until PPG can prove that the contract exists as it alleges and contains a choice of forum provision, then this argument is meritless.

Even if the argument did have merit, PPG has not established -- or alleged -- the elements warranting a transfer. Indeed, as this case involves the alleged defective design or manufacture of Gaskets, the access to the manufacturer's records and plant personnel favors the jurisdiction of the manufacturer, *i.e.*, the Northern District of Ohio. Process to compel the attendance of unwilling witnesses, such as employees of the Colorado insurer who sued PPG, who are based in the Colorado building where Mantaline's Gaskets were allegedly installed, is no less effective from the Northern District of Ohio than the Western District of Pennsylvania. The cost of obtaining the attendance of willing witnesses, and a view of the Colorado premises where the Gaskets were installed, favors neither jurisdiction in this case.

Since PPG offered no proof that it would be inconvenienced by defending this case in the Northern District of Ohio, and has offered no proof that the interests of justice favored a transfer of this case to the Western District of Pennsylvania, and 28 U.S.C. § 1404 and the cases interpreting this statute, *see e.g.*, *Bacik v. Peck*, 888 F. Supp. 1405 (N.D. Ohio 1995), indicate that a Motion such as PPG's

herein should be denied, Mantaline submits that the District Court's Order denying PPG's Motion to Transfer was proper.

CONCLUSION

The text of O.R.C. § 1302.10(C) does not support PPG's argument that the absence of competing offers, or an order acknowledgment, is necessary to trigger its application. This statute, and its official comment, confirm that where the parties' *writings* do not establish a contract, conflicting terms are disregarded. Mantaline's Written Quotation specifically objected to new and differing terms, thereby preventing any misunderstanding that shipment could be interpreted as assent to terms. Application of O.R.C. § 1302.10(C) prevents PPG from forcing upon Mantaline the indemnity and arbitration terms of PPG's Purchase Order. If PPG wishes to impose terms on another party, it should be required to secure the other party's express assent to its proposed terms -- a step that PPG chose not to implement. Accordingly, Mantaline requests that this Court affirm the decision of the District Court.

Respectfully Submitted,

/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Brief of Appellee were forwarded via regular U.S. mail to Amie L. Bruggeman, Esq., Attorney for PPG Industries, Inc., Roetzel & Andress, 75 E. Market Street, Akron, Ohio 44308, this 15th day of June, 1998.

/s/_____
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APPELLEE'S CROSS-DESIGNATION OF JOINT APPENDIX CONTENTS

Appellee, pursuant to Sixth Circuit Rule 11(b), hereby cross-designates the following parts of the record as items to be included in the Joint Appendix:

Description of Entry	**Date**	**Record**	**Page No.**
Plaintiffs Complaint	03/06/95		
Plaintiff's Amended Complaint	03/13/95	--	
Order	06/02/95	29	
Plaintiff's Reply Brief	09/16/97	73	
Docket of the District Court	-	-	

APPENDIX F

PPG INDUSTRIES, INC. PURCHASE ORDER

GENERAL CONDITIONS

1. ACCEPTANCE, This Purchase Order contains the entire contract between the parties hereto with respect to the materials specified or the work to be performed hereunder, and no contract or other understanding in any way purporting to change, modify or supersede the terms hereof shall be binding upon Buyer unless otherwise expressly agreed to by Buyer in writing. Seller's acceptance of this Purchase Order (whether by execution of the Acceptance Copy or otherwise), commencement of performance hereunder or shipment of the materials ordered hereby shall conclusively evidence Seller's acceptance of this Purchase Order and the terms hereof. Buyer hereby expressly objects to any provision, terms or conditions of any of Seller's printed forms or other writings which is additional to, different from or inconsistent with those contained or referred to herein. Buyer's acceptance of or payment for any shipment required under this Purchase Order shall not in any way alter the terms hereof.

2. PRICES AND PAYMENTS. Buyer shall pay the price(s) stipulated on the reverse side hereof. Unless otherwise specified herein, payment shall be due, after receipt and inspection of the materials or work subject to this Purchase Order at the premises designated by Buyer on the reverse side, or the receipt by Buyer of proper invoices, whichever is later. If the price(s) is not stipulated herein, this

Purchase Order is not to be filled at any price(s) higher than the last price(s) previously quoted to Buyer by Seller, without the prior written authorization of Buyer.

3. CHANGES. Buyer may at any time by written notice make changes within the general scope of this Purchase Order to drawings and specifications, shipping instructions, quantities, and delivery schedule. Upon receipt of such notice the parties shall negotiate in good faith within a reasonable time an equitable adjustment in price and/or time for performance. The change shall become effective upon agreement concerning such adjustment and this Purchase Order modified accordingly at that time.

4. PACKING AND SHIPPING. Seller shall pack, mark and prepare the materials for shipment in a manner which will prevent damage or deterioration, secure the lowest transportation rates, comply with carrier regulations and otherwise in accordance with any instructions of Buyer set forth on the reverse side hereof. No charges will be paid by Buyer for packing, crating or cartage unless stated in the Purchase Order.

5. SCHEDULING. Deliveries of materials or performance of work shall be strictly in accordance with the schedule set out or referred to on the reverse side hereof and in the exact quantities ordered or, if no time limit(s) is specified, within a reasonable time. Seller understands and agrees that TIME IS OF THE ESSENCE and complying with the specified delivery date or work schedule is equally important as maintaining the price(s) and specification(s) and if the schedule as specified cannot be maintained Buyer must be immediately notified. Buyer reserves the right to cancel all

or any part of this Purchase Order if materials are not delivered or work performed in accordance with the schedule herein. Any materials received after the date(s) of the schedule specified herein will be held subject to Buyer's right to reject, or direct disposal, of all or any part thereof.

6. WARRANTIES. In addition to any specific warranties set forth on the reverse side hereof. Seller warrants: (a) all materials, services and work furnished hereunder will conform to the requirements of this Purchase Order (including but not limited to all applicable descriptions, specifications, drawings, data and samples, whether supplied by Seller or Buyer) and will be merchantable, of first class material and workmanship, free from defects including defects in design, and fit, suitable and sufficient for the intended purposes; (b) all materials herein described and their sale or use alone or in combination according to Seller's specifications or recommendations, if any, will not infringe any United States or foreign patents, trademarks, trade secrets or proprietary rights of any third party; and (c) in performance of this Purchase Order, Seller has complied or will comply, and all materials or work or services furnished hereunder have been produced or furnished in full and complete compliance, with all applicable Federal, State and local laws and ordinances and all lawful orders, rules and regulations thereunder, including without limitation compliance with Executive Order No. 11246 (Equal Employment Opportunity), Executive Order No. 11701 (Listing of Job Openings for Disabled Veterans and Veterans of the Vietnam Era), Executive Order No. 11758 (Employment of the Handicapped), the Federal Occupational Safety and Health Act of 1970, the Consumer Product Safety Act, the Toxic Substances Control Act, the Federal Hazardous

Substances Act and the Fair Labor Standards Act (provided that where necessary to make the context of any law, rule and regulation applicable to this Purchase Order, the term "Contractor" shall mean the Seller and the tern "Contract" shall mean this "Purchase Order"). These warranties are in addition to and shall not be construed as restricting or limiting any warranties of Seller, expressed or implied, which are provided or exist by operation of law.

7. INSPECTION. Buyer reserves the right to perform inspection and/or expediting of the materials, and the fabrication thereof, at the facilities of Seller or its suppliers at any reasonable times. All materials or services are subject to final inspection and acceptance by Buyer at destination, notwithstanding any prior payment or inspection at source, and such inspection shall be made with a reasonable time after delivery or completion of work. Buyer shall notify Seller if any materials delivered hereunder are rejected and, at Buyer's election and Seller's risk and expense, such materials shall be held by Buyer or returned to Seller. Acceptance of any materials, services or work shall not be deemed to affect the obligations of Seller or the rights of Buyer under the Warranties or Indemnification clauses.

8. USE OF INFORMATION. All specifications, drawings, samples, designs and other data or information furnished by Buyer to Seller hereunder or in contemplation hereof shall remain Buyer's property. All originals and copies of such documents shall be returned to Buyer upon Buyer's request. Unless such documents and information therein were previously know to Seller free of any obligation to keep such confidential, or has been or is subsequently made public by Buyer or a third party, it shall be kept confidential

by Seller and shall be used only with respect to this Purchase Order and may be used for no other purpose. No specifications, drawings, sketches, models, samples, tools, technical information or other data furnished by Seller to Buyer or in contemplation hereof shall be considered by Seller to be confidential or proprietary.

9. MATERIAL FURNISHED. Title to all materials furnished by Buyer on other than a charge basis shall at all times be and remain in Buyer. Seller agrees to account for all such materials or pay Buyer for all costs to replace such materials.

10. DEFAULT. Upon default by either party hereto in the performance of any obligation hereunder, the other party may give notice in writing to the defaulting party specifying the nature of the default. Unless such default be cured within fifteen (15) days following the giving of such notice, this Purchase Order may be terminated at the option of the party giving such notice. Such termination shall not relieve the party in default from any obligations accrued to the date of such termination or from liability in damages for breach of this Purchase Order. Notwithstanding the foregoing, if any shipment of the material does not conform tit he specifications for the material set forth herein, Buyer may, without prejudice to its rights to damages, by written notice to Seller, terminate this Purchase Order without Seller having the right to cure the default. Waiver by either party of a single default, or a succession of defaults, shall not deprive such party of any rights arising by reason of any subsequent default.

11. INDEMNIFICATION. Seller agrees to indemnify, defend and hold harmless Buyer, its officers, employees and

representatives, from and against any and all damages, claims, demands, expenses (including reasonable attorneys' fees), losses or liabilities of any nature whatsoever, and whether involving injury or damage to person or property, and any and all suits, causes of action and proceedings thereon arising or allegedly arising from or attributable to; (i) the materials, services or work herein ordered, furnished or from the use thereof; (ii) Seller's failure to comply with any applicable law, rule or regulation; or (iii) from any breach of default by Seller hereunder, excepting when caused by the proximate negligence of Buyer. This indemnity shall survive the termination or cancellation of this Purchase Order, or any part hereof.

12. INSURANCE. For work or services done for Buyer on the premises designated by Buyer on the reverse side hereof, Seller shall furnish Buyer prior to commencement of work or services certificates of insurance showing that Seller has Workmen's Compensation, Employer's Liability and Comprehensive General Liability (including automobiles), Coverages in the minimum amounts and form as may be specified by Buyer's Insurance Department, which Coverages shall not be allowed to change or expire until the entire services or work has been completed and accepted.

13. ARBITRATION. Any claim or controversy arising out of or relating to this Purchase Order, or breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof. Any such arbitration shall take place in Pittsburgh, Pennsylvania, or such other place as Buyer may reasonably designate. The

party against which the award is rendered shall assume and pay all costs associated with such arbitration, including but not limited to reasonable attorney's fees incurred by the other party.

14. CANCELLATION. Buyer reserves the right to cancel this Purchase Order, or any part thereof, at any time without cause, by written notice to Seller. In the event of such cancellation, Buyer shall pay for all materials or services delivered, completed, and acceptable to Buyer and an equitable settlement shall be arrived at for cost incurred by Seller for materials in process and for reasonable profit thereon not to exceed the price specified in this Purchase Order. Upon receipt of any notice of cancellation hereunder, Seller shall, unless otherwise directed, immediately discontinue all work in process and immediately cancel all orders or subcontracts given or made pursuant to this Purchase Order.

15. NOTICE. All notices required or permitted by any provision of this Purchase Order shall be in writing and shall be sent by Registered or Certified Mail, Return Receipt Requested, and addressed to Seller or Buyer at the addresses set forth on the reverse side hereof, or to such other address as either party may hereafter specify by notice in writing to the other.

16. ADDITIONAL PROVISIONS. If this Purchase Order is a Government subcontract, Buyer may have attached hereto additional provisions which are hereby incorporated by reference.

17. MISCELLANEOUS. (a) The failure of Buyer in any one or more instances to insist on performance of any of the provisions hereof, or any part of any such provision, shall in no way be construed to be a waiver of such provision, or any part hereof in the future. (b) This Purchase Order, its performance, any interest herein or in any monies due or to become due herein, may not be assigned or subcontracted by Seller without the prior written consent of Buyer. (c) The remedies herein reserved by Buyer shall be cumulative and additional to any other or further remedies provided in law or equity which Buyer may posses. (d) This contract is made under Pennsylvania Law and this contract shall be governed by and construed in accordance with the Uniform Commercial Code as adopted in Pennsylvania, except as the provisions of such Code are herein varied.

APPENDIX G

MANTALINE CORPORATION QUOTATION

TERMS AND CONDITIONS OF THIS PURCHASE AND SALE

1. This proposal is for immediate acceptance only and is subject to change at any time before orders are accepted by us. This proposal and our acceptance of your orders, signed by a representative of our Company, together with your order, constitutes the entire contract between us. Modifications, changes, additions, cancellations, or suspensions will not be binding upon us unless accepted by a representative of our Company in writing upon terms which will indemnify us against all loss. The terms and conditions contained in this quotation shall prevail over any inconsistent terms contained in buyer's purchase order. Clerical errors are subject to correction. Prices are subject to any city, county or Federal taxes which are or may become effective and are based upon continuous operation of the dies and molds in the quantities specified. The word "parts" as herein used shall mean, and covers, all goods warehouse materials or articles sold herein by seller to buyer. If quantities are reduced or production held up or interrupted by you, parts will be subject to extra charge for the loss involved. Re-orders for parts previously made are considered as placed under the same terms and conditions as the original contract, when such orders are not placed pursuant to a formal proposal and acceptance.

TOLERANCES

2. All parts will be made to finished sizes, subject to the commercial variation incident to our process of manufacture. Very close or particular dimensions should be specified, and permissible variation agreed upon. Changes in the parts as required to suit our process of manufacture will be considered part of the design, and be provided in such forms as will in our judgment best suit the function of the parts, unless otherwise instructed.

SAMPLES

3. Upon completion of the dies or molds, sample parts will be submitted for approval. It is understood that the parts made in accordance with such samples as approved are to be considered as made in compliance with specifications and acceptable to you. All changes made on the original specifications, after dies or molds are placed in production are subject to charge for the cost of extra tool work so involved.

CREDIT

4. You agree to make prompt payment of invoices due in accordance with the terms of our contract. Credit terms herein established or subsequently allowed, are not binding upon us and established no binding precedent. We shall have the right at any time for credit reasons or because of your default or defaults, to demand payment in full for any parts delivered or before proceeding with the manufacture of said parts, or to withhold shipments in whole or in part, to recall parts in transit, and to retake or repossess the same.

DELIVERIES

5. On all non-standard stock items the Buyer agrees to accept a quantity of within, 10% plus or minus of

the quantity ordered. All deliveries are contingent upon availability of raw materials, strikes, accidents, act of God and other events or circumstances of any nature and description, however arising, beyond our control. Deliveries of parts, unless otherwise specified shall commence as soon as our schedules permit, after the approval of samples, and shall be made in accordance with our rate of production until orders are completed; complete delivery to be accepted by you in any event, unless otherwise specified, within three months after approval of sample. If production is held up and we have a stock of parts on hand over the time limit specified, it is understood and agreed that you are to give us disposition of said parts within a period of thirty days. If disposition is not made, we reserve the right to scrap parts and made a change for the loss involved. All material (parts) is shipped F.O.B. Mantua, Ohio.

DEFECTIVE MATERIAL

6. We agree to replace or issue credit for, at our option, all defective parts which have not been altered, machined or finished, providing claim therefor in writing is made within thirty days after receipt of said parts. We reserve the right to inspect parts claimed to be defective before same is returned. No parts can be returned without obtaining a return goods authorization number from seller; if parts are returned without the authorized return goods number they will not be accepted. We will not be responsible, nor will any claim be allowed for the cost of labor or charges of any kind incurred outside our shop, transportation costs or other losses resulting from such parts. Since the product which we are supplying is being manufactured in accordance with the design and specifications of the buyer, we will not assume any liability resulting from a failure of such products.

Buyer herein expressly agrees to indemnify the seller from any and all claims arising out of an alleged defect in design.

DIES, MOLDS, TOOLS & FIXTURES

7. All special tooling for which there is partial tooling charge remain the property of the Seller. The term "Special Tooling" shall include such items as molds, dies, jigs, fixtures, mandrels, etc. The seller warrants that such "Special Tooling" shall be used for the buyer's work only and it shall be the responsibility of seller to maintain in good working order such tooling for the normal life of same. The buyer is responsible for all cots resulting from requested alterations, duplications, or replacement of said tooling.

PATENTS

8. In the event any of the parts produced under this contract infringe or are claimed to infringe any patent, copyright, or trademark, you agree to indemnify and save us harmless from any and all damages, losses or expenses, direct or indirect, to which we may be subjected on that account including but not limited to losses resulting from judgments, attorneys' fees, or settlements with or without your consent.

ENGINEERING SERVICES

9. Our Engineering Department will furnish without charge suggestions concerning the design and construction of parts. We, however, assume no responsibility of any kind concerning such suggestions as their use after adoption by our, and we make no warranty express or implied with reference to such suggestions.

GENERAL

10. The failure upon our part to insist upon a strict performance of any of the terms and conditions herein shall not be deemed to be a waiver of such terms of conditions or of any rights or remedies which we may have in demanding strict performances of all such terms and conditions herein contained.

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 00-620

IN THE

Supreme Court of the United States

MANTALINE CORPORATION,

Petitioner,

v.

PPG INDUSTRIES, INC. and
AMERICAN ARBITRATION ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PPG INDUSTRIES, INC.

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QUESTIONS PRESENTED

1. Under Ohio law, does a contract for the sale of goods contain an arbitration clause when the sole written offer contains that clause and the offeree promptly accepts the offer and performs, without any objection to the offer's proposed terms, without any proposal for additional terms, and without so much as suggesting a negotiation over the terms of the contract.

2. Does Ohio Revised Code § 1302.10 apply when the offer expressly limits acceptance to the terms of the offer, and the offeree accepts the offer without "stat[ing] terms additional or different from those offered or agreed upon. . . ." Ohio Rev. Code § 1302.10(A).

STATEMENT PURSUANT TO RULE 29.6

Respondent, PPG Industries, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

At some time before January of 1986, Respondent PPG Industries, Inc., a Pennsylvania corporation, asked several companies, including Petitioner Mantaline Corporation, an Ohio company, to provide it with a written quotation for the supply of interior and exterior glazing gaskets for use by PPG in the Security Life Center; an office building in Denver, Colorado. PPG wanted those gaskets as part of its bid to supply windows for the Security Life building.

PPG personnel testified at deposition that they probably received Mantaline's response to PPG's request. Although the original was not in the parties' records, Mantaline's response was a standard quotation form which had several pre-printed terms, including the terms:

> This proposal is for immediate acceptance only and is subject to change at any time before orders are accepted by us. This proposal and our acceptance of your orders, signed by a representative of our Company, together with your order, constitutes the entire contract between us.

(Petition for Writ of Certiorari Appendix at 98a). Both the district court and the Court of Appeals held that, in light of this terminology, Mantaline's quotation form was not, under Ohio law, a contractual offer; but was rather simply an invitation to deal.

In January of 1986, PPG issued a purchase order to Mantaline, asking it to supply the gaskets and related materials described in the request for a written quotation, at the price of $56,399.36. The purchase order was expressly

conditioned on the supplier's (Mantaline's) consent to all its terms, and indicated that the supplier's assent to the purchase order's terms "will be manifested by delivery of any portion of the goods designated herein."[1] The purchase order included both an indemnity clause and an arbitration provision. Petitioner Mantaline shipped the ordered goods without adding or disclaiming any contract terms.

Because of damage caused to the windows when the gaskets installed at the Security Life building leached sulfur, Security Life sued PPG in the United States District Court for the Southern District of Colorado. After that litigation was concluded, PPG commenced arbitration proceedings seeking indemnity, which prompted this lawsuit. Mantaline brought suit in Ohio state court, seeking both a declaratory judgment over the terms of the parties' contract and an injunction enjoining PPG from compelling arbitration. PPG removed the case to the United States District Court for the Northern District of Ohio on the basis of diversity jurisdiction.

In the district court, although the court held that Petitioner Mantaline's standard quotation form was not an offer, it nonetheless contradicted PPG's terms, supporting application of Ohio Rev. Code § 1302.10(C), a portion of Ohio's version of U.C.C. 2-207, the "battle of the forms" provision. In so doing, the district court relied upon a previous Sixth Circuit opinion construing Ohio's UCC sales provisions, *McJunkin Corp. v.*

1. The Appendix to the Petition does not contain the full text of the PPG's purchase order. Particularly, and peculiarly given the attention directed to it by the Sixth Circuit, the Appendix does not contain the fully capitalized condition which appeared on the face of the purchase order, which stated "THIS PURCHASE ORDER IS EFFECTIVE AND EXPRESSLY CONDITIONAL ON SUPPLIER'S ASSENT TO ALL TERMS AND CONDITIONS IN THIS PURCHASE ORDER. . . ." (*See* Sixth Circuit's Opinion, Petition at 6a).

Mechanicals, Inc., 888 F.2d 481 (6th Cir. 1989). Inasmuch as Ohio Rev. Code § 1302.10(C) provides, in part, that "the terms of the particular contract consist of those terms on which the writings of the parties agree", the district court held that the parties had not agreed to arbitrate, and granted summary judgment in favor of Petitioner Mantaline.

On appeal, the Sixth Circuit reversed. The Circuit Court found that inasmuch as there was but one offer, and inasmuch as Petitioner Mantaline performed without any exception or disclaimer to the terms of the offer, a contract was formed on Respondent PPG's terms; hardly a novel proposition. In its discussion, the Sixth Circuit found that Section 1302.10(C) "does not exist in isolation." (Petition for Writ of Certiorari Appendix at 6a). The Court found that Ohio Rev. Code § 1302.09, U.C.C. 2-206, provides that performance constitutes acceptance, and that 1302.10(C) must be read with the other provisions of Section 1302.10, i.e. U.C.C. 2-207(1) and (2), and its "battle of the forms" provisions only apply when acceptance or confirmation of an offer is met with new or additional terms; an event which did not occur in the PPG/ Mantaline transaction, but which did occur in the Sixth Circuit's prior *McJunkin* opinion. The court concluded:

> Because PPG's purchase order constituted the sole "offer", and Mantaline's shipment of conforming goods constituted an unqualified "acceptance" of the offer, the resulting contract included the terms of PPG's purchase order providing for indemnification and arbitration of disputes.

(Petition for Writ of Certiorari Appendix at 11a). The Circuit Court consequently reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion.

REASONS FOR DENYING THE WRIT

The Court of Appeals' opinion in this case was premised upon three conclusions. First, Petitioner's standard quotation form, by its equivocating reservation of final contract approval, was simply an invitation to deal, without legal effect under Ohio law. This is a basic conclusion of traditional contract law. *See* Restatement (Second) of Contracts § 26 ("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). Second, PPG's order, which expressly anticipated acceptance by performance, was accepted by Petitioner's performance which was not accompanied by any objection or proposed additions to PPG's terms. Again, this comports with Ohio law, and the common law generally. *See* Ohio Rev. Code § 1302.09(A)(2) ("an order . . . shall be construed as inviting acceptance . . . by prompt shipment of conforming or non-conforming goods."); Restatement (Second) of Contract § 30(1). Third, the Court of Appeals held that the terms of the contract were those of PPG's offer, which was accepted by Petitioner's performance and that Petitioner's failure to object to PPG's terms prevented application of Ohio Rev. Code § 1302.10. Again, the conclusion is not surprising; the terms of a contract are those of the offer, accepted by the offeree. Since the founding of the Republic, it has been "an undeniable principle of the law of contracts" that acceptance without reservation creates a contract "according to the terms in which the offer was made." *Eliason v. Henshaw*, 17 U.S. 225, 227 (1819). The Sixth Circuit's conclusions of law are in accord with a host of authority, around the country, construing other state's versions of the U.C.C. *See infra*.

Given the foregoing facts and conclusions of law, the Petition is without merit. This case does not involve an important question of federal law that has not been but should be decided by the Court. Sup. Ct. R. 10(c). This case does not turn on an important federal question which has been decided by a state court of last resort in a manner conflicting with another state court of last resort or federal courts of appeal. Sup. Ct. R. 10(b). There is no argument that the lower courts' practice departed from the accepted and usual course of judicial proceedings, or that the Sixth Circuit's judgment conflicts with a state court of last resort on an important federal question. Sup. Ct. R. 10(a).

Rather, dissatisfied with the Court of Appeals' clear cut conclusions of basic Ohio contract law, Petitioner asserts two issues for the Court's review; the alleged deprivation of its right to a jury trial and an alleged conflict, regarding the application of state law, between the Sixth and Fifth Circuits. The Petition betrays a misunderstanding of the law governing contract formation, its effect on the rights of the parties, and the role of the Uniform Commercial Code in our federal system; points to which Respondent now turns.

I.

THE OPINION AND JUDGMENT OF THE COURT OF APPEALS WAS, PROPERLY, PREMISED UPON STATE LAW

As the Court has noted, when deciding whether the parties have agreed to arbitrate, courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944

(1995). This is precisely what the lower courts did in this case. As Petitioner noted in the Court of Appeals:

> [t]he central issue in this case is whether the District Court properly determined that Ohio Revised Code § 1302.10(C) prevents . . . PPG Industries, Inc.'s . . . purchase order provisions, which conflict with those contained in . . . Mantaline Corporation's quotation from becoming the sole terms and conditions applicable to their contract for the sale and purchase of window gaskets.

(Petition for Writ of Certiorari Appendix at 59a). In other words, the courts below interpreted Ohio law governing contract formation to determine whether the parties had, by their written terms and conduct, agreed to arbitrate. As the Court has noted: "a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983).

Apparently, despite the fact that Petitioner has, as a matter of law, entered into a contract calling for arbitration, Petitioner believes that its standard quotation form illustrates it had not consented to arbitration, and hence a conclusion that it agreed to arbitrate conflicts with the Court's opinions in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) and *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). These opinions, however, and the Federal Arbitration Act itself, require an agreement to arbitrate, a matter decided under state law of contract formation. Petitioner simply fails to recognize the consequences of its actions. Under Ohio

law, by performing without objection, Petitioner accepted the terms and conditions of PPG's offer as forcefully and fully as if it had signed an acceptance. It is hardly unusual for a Court to find that conduct such as performance manifests assent to a bargain. *United States ex rel. Modern Electric, Inc. v. Ideal Electronic Security Co., Inc.*, 81 F.3d 240, 244 (D.C. Cir. 1996) ("a purchase order may stand as an offer with performance of its terms constituting acceptance * * * [t]his principle is well-recognized, even outside District of Columbia common law."). Petitioner's complaint to this Court is simply one shared by every litigant who denies being party to an arbitration agreement.

II.

THE COURT OF APPEALS DID NOT ADDRESS THE CLAIMED VIOLATION OF PETITIONER'S RIGHT TO TRIAL BY JURY, NOR IS THAT RIGHT IMPLICATED BY THE SIXTH CIRCUIT'S JUDGMENT

Apparently in an attempt to shoehorn a federal issue into its state-law objections, Petitioner claims that the Sixth Circuit's determination that the contract includes an arbitration clause deprives Petitioner of its constitutional right to a jury trial. There are numerous logical and procedural difficulties with Petitioner's request for review of this "issue".

First, in the Sixth Circuit, the only discussion of a violation of Petitioner's jury trial right was the bare assertion, in Petitioner's appellate brief, that requiring arbitration would violate Petitioner's jury trial right under the United States and Ohio Constitutions. (Petition for Writ of Certiorari Appendix at 82a). Petitioner never discussed why such a

violation would occur, nor did the Sixth Circuit address this assertion. There is good reason for the disregard of Petitioner's jury-trial argument: "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984). Petitioner improperly asks this Court to review a phantom issue which received no substantive attention from either the parties or the courts below. *See Perry v. Thomas*, 482 U.S. 382, 492 (1987) ("[w]e likewise decline to reach [plaintiff's] contention that [defendants] lack 'standing' to enforce the agreement to arbitrate any of these claims, since the courts below did not address this alternative argument for refusing to compel arbitration."). *See also J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed. . . ."). Moreover, even if the Court of Appeals had addressed the issue of Petitioner's jury trial right, and there was, in fact, a record-based issue for the Court to review, the underlying premise of Petitioner's jury trial question is incorrect for two reasons.

First, as noted above, the waiver of the right to a jury is a necessary consequence of Petitioner's agreement to arbitrate. In accordance with black-letter law, the Sixth Circuit found an agreement to arbitrate. A jury trial right is no more or less implicated in this case than in every case in which a party, over its objections, has been found to have agreed to arbitration. Further, Petitioner would simply not be entitled to a jury's determination of whether it agreed to arbitrate; under Ohio law the construction of written contracts and instruments is a matter of law, the jury simply determines breach. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d

241, 374 N.E.2d 146, 148 (1978). Plaintiff's alleged jury trial right is, necessarily, subsumed within the state law question decided by the Sixth Circuit.

Second, as this Court has mandated, the lower courts determined whether the parties had agreed to arbitrate in accordance with state law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The lower courts did what judges do every day — determine whether the parties had reached a contract, and what the terms of that contract were. Petitioner's argument that its jury trial right is implicated by the Circuit Court's state law conclusion is nothing more than an obvious attempt to alter state law for one reason alone — an arbitration provision is contained within the agreement at issue. Such an argument, of course, flies in the face of the Federal Arbitration Act, and the cases decided thereunder, wherein Congress and the federal courts have sought to ameliorate vestigial judicial hostility to arbitration. As the Court has noted:

> [a] court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

III.

THE COURT OF APPEALS' DECISION WAS CONSISTENT WITH OHIO LAW, WITH THE UNIFORM COMMERCIAL CODE, AND IS NOT IN CONFLICT WITH THE LAW STATED BY THE FIFTH CIRCUIT

Finally, Petitioner argues that the Sixth Circuit's opinion is a "judicial modification of § 2-207(3) of the Uniform Commercial Code [and] conflicts with the ruling of the Fifth Circuit Court of Appeals. . . ." (Petition for Writ of Certiorari at 9). Petitioner's argument is premised upon a misunderstanding of the law of contract formation, the Fifth Circuit's holding in *Axelson, Inc. v. McEvoy-Willis*, 7 F.3d 1230 (5th Cir. 1993), and the role of the Uniform Commercial Code in our federal common law system. Respondent will address these three points in turn.

A. THE COURT OF APPEALS LOGICALLY APPLIED OHIO'S U.C.C. STATUTES IN A MANNER CONSISTENT WITH THE COURTS THAT HAVE ADDRESSED THE ISSUES RAISED.

As the Sixth Circuit noted, Petitioner reads Ohio Rev. Code § 1302.10(C) [U.C.C. 2-207(3)] "in isolation". (Petition for Writ of Certiorari Appendix at 6a). Petitioner suggests that so long as there are any conflicting "writings", combined with performance, Article 2 of the U.C.C. demands that the terms of the sales contract are limited to those to which the parties' writings agree. For obvious reasons, the Sixth Circuit rejected this argument — under the very terms of the U.C.C. (and, for that matter, the common law), a written offer can be accepted by performance. A true "battle of the forms" occurs when the "expression of acceptance or

written confirmation . . . states terms additional or different from those offered or agreed." Ohio Rev Code § 1302.10(A) [U.C.C. 2-207(1)]. This is the very purpose of the Section — under the common law an acceptance containing differing terms constituted a counter-offer. Petitioner's problem is that it whole-heartedly accepted PPG's offer; there was no counter-offer to invoke a battle-of-the-forms.

As the Court has noted: "[i]t is our practice to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.' " *Haring v. Prosise*, 462 U.S. 306, 314 (1983) (*quoting Bishop v. Wood*, 426 U.S. 341, 346 (1976)). It goes without saying that the Sixth Circuit's approach to Ohio Rev. Code § 1302.10 is entirely reasonable. Indeed, it is consistent with the opinions of other federal courts interpreting other states' versions of U.C.C. 2-207. *See, e.g., Litton Systems, Inc. v. Leviton Mfg. Co., Inc.*, 15 F.3d 790, 784 (8th Cir. 1994) (applying Minnesota law); *Gulf States Utilities Co. v. NEI Peebles Electric Products, Inc.*, 819 F. Supp. 538 (M.D. La. 1993) (applying California law); *Technographis, Inc. v. Mercer Corp.*, 777 F. Supp. 1214 (M.D. Pa. 1991), *aff'd*, 26 F.3d 123 (3rd Cir. 1994) (applying Pennsylvania law). *See also Audio Visual Associates, Inc. v. Sharp Electronics Corp.*, 210 F.3d 254, 259 (4th Cir. 2000) (applying Maryland law). In fact, for at least thirty years, federal courts, applying the U.C.C., have found arbitration clauses to be included in sales contracts under the precise facts presented here: price quotation, followed by purchase order containing arbitration clause, followed by performance without objection to the purchase order's terms. *See Universal Oil Products Co. v. S.C.M. Corp.*, 313 F. Supp. 905 (D. Conn. 1970) (applying

Connecticut law). Despite this logical consistency of approach, Petitioner nonetheless argues both that the Fifth Circuit's *Axelson* opinion is to the contrary and that such a contrary conclusion warrants the attention of the United States Supreme Court. Both arguments suffer in several respects.

B. THERE IS NO CONFLICT BETWEEN THE SIXTH CIRCUIT DECISION, UNDER OHIO STATE LAW, AND THE FIFTH CIRCUIT'S *AXELSON* OPINION.

The Fifth Circuit's opinion in *Axelson* certainly is not contrary to the Sixth Circuit's conclusions in this case — a fact specifically noted by the Sixth Circuit itself. (Petition for Writ of Certiorari Appendix at 10a). Despite the fact that the Fifth Circuit applied Texas law in its case, Petitioner cannot point to one statement of law in *Axelson* which contradicts the Sixth Circuit's judgment in this case. The reason for this lack of contradictory terms is that the *Axelson* panel examined three possible resolutions of an alleged battle of forms question, which arise under facts much more convoluted and strikingly different than those involved here.

In brief, *Axelson* involved a seller's quotation that did not contain a damage limitation provision, followed by the buyer's letter of intent that did not contain the damage limitation provision at issue, followed by the commencement of the seller's performance, followed, at last and three months later, by the buyer's "official" purchase order, which contained the objectionable damage limitation provision at issue.

The Fifth Circuit addressed three possible alternatives: (1) the quotation was an offer that was accepted by a letter of intent, (2) the letter of intent was an offer that was accepted by the seller, or (3) that the conduct of the parties recognized the contract — the approach presumably appealing to Petitioner in this case. The Fifth Circuit found no need to adopt any approach, and expressly made its holding "[a]lternatively", because "[r]egardless of which of the above approaches we take, the result is the same." *Axelson,* 7 F.3d at 1231, 1234 (5th Cir. 1993). Petitioner has neglected to inform the Court of an important point: one of the Fifth Circuit's alternative approaches in *Axelson*, based on contractual offer and acceptance, was entirely consistent with the reasoning of the Sixth Circuit and other courts.

C. EVEN IF THERE WAS A CONFLICT AMONG THE CIRCUITS REGARDING THE SUBSTANTIVE CONSTRUCTION OF TWO DIFFERENT STATES' LAWS, REVIEW BY THE SUPREME COURT IS INAPPROPRIATE.

Finally, the Petition ignores a basic premise of our federal system. Even if the Fifth Circuit's *Axelson* opinion was contrary to the Sixth Circuit's opinion in this case, such a divergence of opinion is the expected (and some would argue preferable) result of our federal system. The Uniform Commercial Code is not a federal law, but is the product of a joint effort by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Despite its name, the U.C.C. is certainly not uniform: "every state has modified the official text of the U.C.C. in one way or another." McLaughlin, *The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age*, 26 Loy. L.A. L. Rev. 691, 692 (1993).

Moreover, even if the state legislatures had enacted an identical Code and had renounced both their own independent *amendments and the numerous subsequent revisions and* amendments proposed by the U.C.C.'s academic authors, the U.C.C. was and is still destined for common law divergence of application. The Act itself provides for common law supplementation of its terms, Ohio Rev. Code § 1301.03 [U.C.C. 1-103] and, significantly for our purposes, "does not define key terms such as 'offer', 'acceptance' and 'possession', thus requiring courts to utilize common-law definitions of these terms when applying the Code." McLaughlin, *The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age*, 26 Loy. L.A. L. Rev. 691, 692 (1993). In short, from its beginning, the U.C.C. would inevitably be subject to change by fifty legislatures and would inevitably be subject to interpretation by fifty state court systems and the various federal courts exercising diversity jurisdiction.

Contrary to the Petitioner's implicit suggestion, a bit of state law divergence, even if it existed, is not necessarily a bad thing. This is "one of the happy incidents of the federal system"; the laboratory of the law. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The Petition asks for the remarkable from this Court — the exercise of its jurisdiction to resolve a phantom conflict between one court's construction of a Texas state law and another court's construction of an Ohio state law.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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